

No. 12491

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United States  
Court of Appeals  
for the Ninth Circuit.

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PICKERING LUMBER CORPORATION, a corporation,

Appellant,

vs.

THE AMERICAN INSURANCE COMPANY,  
et al.,

Appellees.

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Transcript of Record  
In Two Volumes  
Volume II  
(Pages 289 to 622)

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Appeal from the United States District Court,  
Northern District of California,  
Southern Division.

APR 25 1950

PAUL P. O'BRIEN,  
CLERK



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(Testimony of Frank Momyer.)

“When in fact the business of the insured could not be operated and accordingly the actual profits, the fixed charges and expenses continuing, and other charges and expenses incurred could only be ascertained by estimate.”

Down at the bottom of the page I quote again:

“The insured does not believe that it is required by any of [66] the terms of policies to furnish any further details which under any circumstances can only be estimated since the properties cannot be operated by reason of their destruction by fire. Based upon this estimate, the insured claims that the actual profits presented were at least 366,-241, and possibly more.”

Q. (By Mr. Levit): Mr. Momyer, I show you a letter headed Pickering Lumber Corporation, purported to be signed by yourself and Mr. Johnston, addressed to Mr. Frank Maloney, a Mr. Anson Herrick, dated February 28, 1947, and ask you if you signed that letter, and if it was sent to those two gentlemen whose names appear on or about that date?

A. Yes, sir, I can remember that.

Mr. Levit: We will offer this letter in evidence, and ask that it be marked Plaintiff's Exhibit next in order.

The Clerk: Plaintiff's Exhibit N in evidence.

Q. (By Mr. Levit): Mr. Maloney, one of the addresses on this letter was the appraiser appointed by the insurance company, was he not?

(Testimony of Frank Momyer.)

A. That is right.

Q. And Mr. Anson Herrick was the appraiser appointed by Pickering Lumber Corporation?

A. That is right.

Q. Pickering Lumber Corporation acted in this appraisal, and throughout early appraisals, under the advice of counsel, did it [67] not?

A. Well, counsel was in with us on the subject, yes.

Q. And it is a fact, isn't it, this particular letter was drafted after counsel was consulted—talked with counsel, or the actual drafting of the letter by Pickering counsel?

A. That I can't remember, I expect it was drafted by counsel, because the counsel was familiar with the terms of the policy in that respect.

Q. I will read the letter dated February 28.

“Gentlemen:

“You have been appointed respectively appraisers under policies of insurance held by Pickering Lumber Corporation, with respect to which a loss occurred on July 7, 1945. Although the appointment by Pickering Lumber Corporation is subject to the express reservation of its rights under the policies more particularly set forth in its appointment, nevertheless for the purpose of protecting our rights and not in derogation thereof, you are hereby notified that demand is made by Pickering Lumber Corporation of notice of the time and place of the hearing which may be fixed by you

(Testimony of Frank Momyer.)

in connection with the appraisalment. Such a hearing is hereby demanded by Pickering Lumber Corporation at which Pickering Lumber Corporation shall have full opportunity to be heard and to present all evidence on its behalf.

“To assist you in furnishing to Pickering Lumber [68] Corporation notice and opportunity to be heard, we call your attention to the fact that although our office and principal books of account are kept at Standard, Tuolumne County, California, Messrs. Robinson, Nowell & Company, certified public accountants, Crocker Building, San Francisco, California, are in possession of audit reports, working sheets and other detailed data comprising our claim. Mr. Paul V. Barnett of the firm of Watson, Ess, Barnett & Whittaker, 15th Floor, Dierkes Building, Kansas City, Missouri, has been in consultation with us for the past 17 months since the date of the fire, and desires to present facts and other evidence relating to the amount of our loss and accordingly in order to enable him to effect proper transportation reservations, it will be greatly appreciated if you will arrange to have the hearing at a time and place convenient to all parties, particularly so as to enable Mr. Paul V. Barnett to make the necessary arrangements to come to California for that purpose.

“Signed, Very Truly Yours, Pickering Lumber

(Testimony of Frank Momyer.)

Corporation, By Ben Johnston, President, and F. F. Momyer, Treasurer."

Q. (By Mr. Levit): Now, you received a reply to that letter, Mr. Momyer. I will ask you if you recall receiving the original of the letter that I now hand you from Mr. Maloney dated March 4, 1947?

A. Yes, sir, I am sure I received that letter. [69]

Mr. Levit: I suppose, counsel, we might as well use the copy, unless you have the original handy.

Mr. Whittaker: I haven't any objections to it. I have seen the copy of it.

Mr. Levit: We will offer this letter of March 4th in evidence.

The Clerk: Plaintiff's Exhibit O.

Mr. Levit: It is from Mr. Maloney to Pickering people. It says:

"Gentlemen:

"Your letter of February 28th regarding fire loss appraisal at hand.

"You may be assured that plenty of notice will be given you for the purpose of presenting your evidence in the loss which occurred July 7, 1945. As to Mr. Barnett coming to California, I would say that as soon as Mr. Anson Herrick and myself can agree upon a third party, we will set a date.

"Hoping that this meets with your approval, I am,

"Yours very truly, Frank Maloney."

Now, you also received, did you not, under date

(Testimony of Frank Momyer.)

March 21st, the original of this letter I now hand you addressed to the Pickering Lumber Corporation and signed on behalf of all three of the appraisers, by Mr. Herrick?

The Court: What is that date? [70]

A. March 21, yes, we received this letter.

Mr. Levit: We ask it be marked Plaintiff's Exhibit P.

The Clerk: Plaintiff's Exhibit P in evidence.

Mr. Levit: This is a letter to Pickering Lumber Company.

"Gentlemen:

"This is to advise you that the hearing in the matter of the appraisal of the business interruption loss claimed to have been sustained by your company as a result of a fire on July 7, 1945, has been set for 10:00 a.m., Wednesday, March 26, 1947, in San Francisco at a location yet to be determined.

"Faithfully yours, Frank Maloney, Anson Herrick, Louis Lilly, Appraisers and Umpire. By Anson Herrick, Appraiser."

You will note that carbon copies went out to Frank Maloney, Louis Lilly and Mr. Herrington, George Herrington, who counsel stated was representing Pickering at the time, and then at the bottom of the letter is typed, and I quote:

"The meeting will be held in the meeting room of the offices of Orrick, Dalquist, Neff, Brown & Herrington, Financial Center Building, corner California and Montgomery Streets."



(Testimony of Frank Momyer.)

Mr. Levit: I assume it will be stipulated, counsel, that that postscript was on the letter at the time it went out?

Mr. Whittaker: Yes.

Mr. Levit: We now offer in evidence with that identification — and I presume by stipulation, counsel?

Mr. Whittaker: You mean the one you hold in your hand? [71]

Mr. Levit: A letter dated March 21st, the same date as the other letter, and addressed to all of the insurance companies, attention of Mr. Withers, Fire Company Adjustment Bureau, and reads precisely the same as the one just introduced, as Plaintiff's Exhibit P, we ask that be marked in evidence.

The Clerk: Plaintiff's Exhibit Q in evidence.

Q. (By Mr. Levit): Now, Mr. Momyer, a hearing actually was held by the appraisers, which hearing started on March 26, at 10:00 o'clock in the morning, and ran more or less all that day, and continued—was held again on March 27, the following day, do you recall that?

A. Yes, I believe so.

Q. You were present at both of those hearings, weren't you? A. Yes, sir.

Q. Now, in addition to yourself, and the three appraisers, Mr. Johnston, who was chairman of the board of directors of Pickering, was present, is that correct? A. Yes.

(Testimony of Frank Momyer.)

Q. Mr. Paul Barnett, your counsel from the Middle West?      A. That is correct.

Q. And Mr. George Herrington of the local counsel, Mr. W. H. Thomas, mentioned this morning in connection with the report on the log-degrading?

A. That is correct, yes.

Q. Mr. Jones of Standard, your sales manger?

A. Correct.

Q. Mr. Lucas of Robinson, Nowell & Company, certified public accountants for Pickering?

A. That is correct.

Q. And Mr. Withers, and Mr. Ball representing the insurance company?      A. Correct.

Q. Mr. Frank Barker, who was an accountant, who was acting for the insurance company?

A. Correct.

Q. Mr. Kurt, a witness called by Pickering?

A. Correct.

Q. Mr. LeMoffatt, also mentioned this morning in connection with the log depreciation?

A. Yes.

Q. Now, do you recall that at the commencement of that hearing, Mr. Herrington submitted or read a memorandum of procedure to be followed by the appraisers?

A. That Mr. Herrick read a memorandum?

Q. Yes, the procedure that was to be followed.

A. I can't say that I remember that definitely, Mr. Levit.

Q. Well, you do remember, do you not, Mr. Her-

(Testimony of Frank Momyer.)

rick on behalf of the three appraisers outlining the purpose of the hearing and to inform the appraiser and umpire all the data they should take up and consider, the U. and O. loss in connection with the policy?

A. I believe he made a verbal statement at that time, yes, sir.

Q. And do you recall that he also pointed out that the appraisers would not necessarily restrict considerations to the data originally presented at the hearing, but they would feel free to ask for such additional data from either side, they might need and get any other information, from sources they determined appropriate.

Mr. Whittaker: May I ask counsel what point this is, I will admit that such a statement was made, and that nobody objected or excepted it, is that what you want?

(Thereupon a short argument was delivered to the Court by Mr. Levit.)

Mr. Levit: Then counsel, I will ask you to stipulate that at the commencement of the hearing, Mr. Herrick pointed out in the presence of all the parties I have mentioned that the appraisers would not necessarily restrict their considerations to the data originally presented but would feel free to ask for such additional data that they might desire, and also to obtain in other matters other sources of information determined by them to be appropriate.



(Testimony of Frank Momyer.)

Mr. Whittaker: Yes, I will so agree he said that, and will you agree that nobody made any exception to it or objected to it?

Mr. Levit: I will not only agree, but that was the next thing I was going to bring out. [74]

The Court: We will take a recess now and meet at 9:30 tomorrow morning.

(Thereupon an adjournment was taken in the above-entitled case to tomorrow, Thursday, June 9, 1949, at 9:30 o'clock a.m.) [74A]

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Thursday, June 9, 1949

The Clerk: The case of American Insurance Company vs. Pickering Lumber Company, for further trial.

Mr. Levit: Your Honor, the Clerk spoke this morning in regard to the length of trial still to come. While I am not, of course, certain as to what counsel is planning, I will say that I am prepared to accept his suggestion and stipulate that the deposition of Mr. Herrick be put into evidence. I can think of no other way that we can shorten the matter.

The Court: I do not wish to require to shorten the matter.

Mr. Levit: I realize you are not requiring us to shorten the matter, but I am willing to stipulate to that.

The Court: If you would prefer to call Mr. Her-

rick, Mr. Maloney, and Mr. Lilley, you can do so.

Mr. Levit: My stipulation will run to the three of them, that we put in their depositions.

Mr. Whittaker: In lieu of the production of the witnesses?

Mr. Levit: Yes. Of course, it will be understood that we are not thereby intending to waive our objections to the competency, relevancy, or admissibility of the testimony.

The Court: That's right, but I do not want you gentlemen to understand that you are in any way being jeopardized by rushing the case through. I want you to put in your testimony in the best way you see fit.

Mr. Whittaker: At the pre-trial conference I made the [2] suggestion with this objective in mind, the one objective of economy of time, and I believe that with men of the character of these men there would be no further facts elicited or developed than were developed by the depositions; because men like these men are not going to change their stories. We all know that, and therefore I thought we would be unnecessarily burdening the Court to require your Honor to hear in the flesh the testimony they had already given. I accept the offer of the stipulation counsel just now made. It will save a considerable amount of time.

Mr. Levit: Then, I will ask at this point in order to avoid confusion in the record that we now proceed the exhibits appropriately so that there will

be no confusion, and that they will have the same numbers.

Mr. Whittaker: I say further to your Honor it would have been necessary, and it has developed, to offer the deposition of Mr. Maloney at all events, because, though he is under subpoena, he has left the city and is in Washington, D. C., and his office cannot tell us just when he will be back. He is out of the jurisdiction of the court. That we learned yesterday morning. I wanted your Honor to know about that.

Mr. Levit: The deposition will be marked, of course. I don't know that it is necessary to mark it as an exhibit. Other words, both counsel have agreed that it will be agreed by the court as in evidence, as though the witness were called [3] and testified just as he did in the deposition.

The Court: It does not make any difference.

Mr. Levit: We assume it may be deemed read?

The Court: Yes, it is in evidence anyway, in one way or another.

Mr. Whittaker: Might I inquire in that connection, since Mr. Levit has said it will be assumed or deemed that these depositions were read, we are glad to read them if your Honor would like us to do that.

The Court: It will take time to read them here, but I will do whatever you gentlemen desire. It seems to me in your arguments you could refer to them.

Mr. Levit: I suggest we be given a little time

to think over the matter of the reading of the depositions. We ought to get through with the witnesses we have here in court and call them, and then if either of us wishes to read the depositions, we can do that.

The Court: Yes.

Mr. Levit: In order not to confuse the record I am going to run down the list of exhibits of each of these depositions and note whether it has been already marked and introduced and if not, see that it gets an appropriate number.

Mr. Whittaker: You are about to do something that I think is not correct. You mean now to re-number the exhibits to the deposition that are already numbered in the depositions? [4]

Mr. Levit: Certainly.

The Court: They are in evidence now and counsel wants to get the right numbers in evidence.

Mr. Levit: Certainly.

The Court: You have Plaintiff's Exhibit C attached to Herrick's deposition.

Mr. Whittaker: I don't wish to object, but mention this so we can keep it straight.

Mr. Levit: I think we can keep it straight very easily. Defendant's Exhibit No. 1 is a copy of a letter dated April 4, 1947, from Mr. Withers to Mr. Maloney and Mr. Herrick. Is that here? If not, I will furnish a copy.

The Clerk: Yes, that is Defendant's Exhibit 1 of the deposition.

Mr. Levit: We ask that be marked Defendant's Exhibit next in order.

The Clerk: Defendant's Exhibit No. 4, a letter of April 4, 1947, from Withers to Frank Maloney and as contained in the Herrick deposition.

The Court: So ordered.

(Whereupon letter of April 4, 1947, from Withers to Maloney was received in evidence and marked Defendant's Exhibit No. 4.)

Mr. Levit: Defendant's Exhibit No. 2 in the Herrick deposition has already been introduced in evidence as Plaintiff's Exhibit D. [5]

The Clerk: That is the proof of loss.

The Court: So ordered.

Mr. Levit: Defendant's Exhibit 3 you have there, counsel. It has not yet been marked. We ask that defendant's exhibit 3 be marked defendant's exhibit No. 5.

The Court: That is the Baker report.

Mr. Levit: That's right.

(Whereupon the Baker report marked Defendant's Exhibit 3 in the Herrick deposition was received in evidence and marked Defendant's Exhibit No. 5.)

Mr. Levit: Now, No. 4 is the brief of the Pickering Lumber Company filed with the appraisers, which has not yet been introduced in evidence, and we ask it be marked Defendant's Exhibit No. 6.

The Court: Yes.

The Clerk: It was Defendant's Exhibit 4 of the deposition and is now marked Defendant's Exhibit 6 in evidence.

The Court: So ordered.

(Whereupon the brief of the Pickering Lumber Company marked Defendant's Exhibit 4 in the deposition was received in evidence and marked Defendant's Exhibit 6.)

Mr. Levit: Defendant's Exhibit No. 5 in the Herrick deposition is already in evidence as Defendant's Exhibit No. 3. That is the Withers brief that was filed with the appraisers.

The Clerk: That is correct. [6]

Mr. Whittaker: Right here, your Honor, may I ask leave to withdraw the Defendant's Exhibit No. 3 and substitute Defendant's copy of No. 3 in the record?

Mr. Levit: No objection.

The Court: All right, so ordered.

Mr. Levit: Now, your Honor, we have offered in evidence as Exhibit F the award of the appraisers and I think, Mr. Clerk, if you will look at Defendant's Exhibit 6 attached to the Herrick deposition you will find it is a copy of the award, perhaps a photostat and a letter with it.

Mr. Whittaker: A letter of transmittal.

Mr. Levit: Or, it may be that is copied into the record—it is.

Mr. Whittaker: No, it is attached as an exhibit or copied at the end.



Mr. Levit: May I ask then that the Defendant's Exhibit No. 6 be attached to Plaintiff's Exhibit F as a part thereof?

Mr. Whittaker: They are the same instrument, though.

Mr. Levitt: Yes, except that in the deposition the transmittal letter to Pickering was included and that is all.

Defendant's Exhibit No. 7 on the Herrick deposition is a so-called finally revised computation which I believe the Clerk has, and we ask that it be marked Defendant's Exhibit No. 7, is that correct?

The Clerk: Yes, Defendant's Exhibit No. 7 in evidence. [7]

(Whereupon Defendant's Exhibit 7 in the Herrick deposition, revised computation, was received in evidence and marked Defendant's Exhibit No. 7.)

Mr. Levit: Turning to the Herrick deposition No. A is not yet in evidence and I will ask the Clerk if he has that letter separately. It is a letter dated May 14, 1947.

The Clerk: Yes, I have it.

Mr. Levit: From Mr. Herrick to Judge Barnett?

The Clerk: Yes.

Mr. Levit: We ask that be marked Plaintiff's Exhibit R.

The Court: So ordered.

(Whereupon letter of May 14, 1947, Herrick to Judge Barnett, was received in evidence and marked Plaintiff's Exhibit R.)

Mr. Levit: Exhibit B in the Herrick deposition is a letter dated March 1, 1948, from Mr. Herrick to Judge Barnett. That will be Plaintiff's Exhibit S?

The Court: So ordered.

(Whereupon letter of March 1, 1948, Herrick to Judge Barnett, was received in evidence and marked Plaintiff's Exhibit S.)

Mr. Levit: Plaintiff's Exhibit C in the Herrick deposition is not yet in evidence. Do you have that, Mr. Clerk? That is headed, "Notes Relating to the Hearing of the Matter by the Appraisers." That is copied into the deposition commencing [8] at page 115, and we ask that be considered Plaintiff's Exhibit T.

The Court: So ordered.

(Whereupon document referred to above, formerly Plaintiff's Exhibit C in the Herrick deposition, was received in evidence and marked Plaintiff's Exhibit T.)

Mr. Levit: Plaintiff's Exhibit D attached to the deposition is entitled "Draft Memorandum of Procedure." We ask that it be marked Plaintiff's Exhibit U.

The Court: So ordered.

(Whereupon document referred to, formerly Plaintiff's Exhibit D, was received in evidence and marked Plaintiff's Exhibit U.)



Mr. Levit: Exhibit E attached to the deposition is a memorandum dated May 2, 1947. That is not yet in evidence and we asked that be marked Plaintiff's Exhibit V.

The Court: Whose memorandum is that?

Mr. Levit: Mr. Herrick's memorandum.

The Court: So ordered.

(Whereupon memorandum referred to, dated May 2, 1947, was received in evidence and marked Plaintiff's Exhibit V.)

Mr. Levit: Exhibit F attached to the deposition is a blue cover document being a summary of differences between the original claim and the insurance company's position as originally stated to the appraisers, prepared by Mr. Herrick, and we [9] ask that it be marked Exhibit W.

The Court: So ordered.

(Whereupon document prepared for appraisers by Mr. Herrick, formerly Plaintiff's Exhibit F, was received in evidence and marked Plaintiff's Exhibit W.)

Mr. Levit: I think the only other exhibit referred to in any of the depositions or attached to any of the depositions is a reference in Mr. Maloney's deposition, Exhibit No. 1, and that document has already been introduced in evidence as Exhibit No. 7.

The Court: Defendant's Exhibit No. 7?

Mr. Levit: Yes, Defendant's Exhibit No. 7.

The Court: Defendant's Exhibit No. 7 is the finally revised computation?

Mr. Levit: That's right, that is the document that was referred to in Mr. Maloney's deposition and was attached as an exhibit in that deposition. I think that covers the matter of the exhibits.

The Court: I understand these depositions are admitted in evidence with the right of counsel to object to the materiality, relevancy and competency of them.

Mr. Levit: Yes, the same point I made as to the opening up of this award at all.

Mr. Whittaker: Mr. Clerk, Mr. Maloney's deposition has not been filed. It has just now been filed and may now be filed. [10]

Mr. Levit: It will be stipulated, of course, counsel, that the lack of notarization will be waived.

Mr. Whittaker: That is presently agreeable. It has not been notarized.

Mr. Levit: There was only one of those exhibits that we did not have in proper form. I am just trying to remember which one it was, the one we had to rely on the deposition for.

Mr. Brown: Exhibit C of the Herrick deposition.

The Court: That is the one you said was copied in the deposition on page 115?

Mr. Levit: That is the one. I just wanted to make a note of that.

Now, your Honor, I would like to offer in evidence at this time for such help as it may be to the Court, a tabulation which we prepared showing a comparison in three separate sets of columns of the amounts claimed in the proof of loss, amounts which

Mr. Pickering computed for the insurance companies as being proper and of the relative amounts set out in the award or used by the appraisers in arriving at the award. Now, I gave a copy of this counsel last night. I may say that in order to make it perfectly clear that this is merely intended as a summary. It is in the nature of the same kind of document as Exhibit No. 7, which is Mr. Herrick's finally revised computation in which he attempts to make the comparison between the claim and the award. That document runs to four pages and this [11] is a simple breakdown for convenience sake in a single sheet which will be of help to everyone concerned. It is not offered to establish anything in the way of proof, but only for the assistance of the Court as an illustration that we prepared to show the comparison between these amounts.

Mr. Whittaker: Now, if it please the Court, we object to it for this reason—it is wrong. It recites figures which it says are found on our proof of loss which are not there. A number of them in the very beginning, you see, for example, our proof of loss shows trade and company use 37,251,575 feet and unit cost of 3.30021 and a box factory footage of 60,356,359, and a unit cost of 15.07780. You will find no such figures in our proof of loss. We show the overall received less the expenses in a round figure.

Mr. Levit: Counsel, I want to be perfectly fair about this. I don't want any misconception of what this is intended to show. If necessary I can estab-

lish these points from Mr. Momyer as to the makeup of the claim. It might well be true, as counsel says, that some details of those figures don't appear in the proof of loss itself, but at any rate they are the figures that were used in arriving at the Pickering claim. The total Pickering claim shown by the proof was \$742,004.41, and that was made up of the items shown up above. As I say, this is not intended to establish as a fact any of the items stated herein. Counsel is perfectly free to argue about them or to prove that the figures were different or that this is not a fair statement. What we tried to do in it, and I think it will be very helpful to the Court, and we are certainly going to use it in argument to set up the columns for the Court's convenience and ready method of comparison for the Court's convenience.

The Court: I don't think it is properly admissible as an exhibit unless you stipulate to it. I see your purpose, which is just to advise me of the differences between the original proof of loss, the original claim, and the amount of the award.

Mr. Levit: That's right, and we will bring Mr. Momyer to the stand and show the makeup of the claim, and we can offer them in evidence as a summary.

Mr. Whittaker: I make this point that our proof of loss speaks for itself.

The Court: I have already ruled I wouldn't admit the document. There is no use in arguing.

Mr. Levit: I will asked it be marked for identification as Plaintiff's Exhibit next in order.

(Whereupon tabulation prepared by Mr. Levit was marked Plaintiff's Exhibit X for identification.)

The Court: Gentlemen, we have a 10:00 o'clock calendar that we must call at this time.

(Recess.) [13]

### FRANK MOMYER

recalled as a witness for the defendant, previously sworn.

Mr. Levit: Your Honor will recall that yesterday on cross-examination of this witness I asked him certain questions with regard to standard accounting texts and practices shown thereby. The objection was made and your Honor felt that the line of questioning was not proper. I did not therefore pursue it further pending an opportunity to present authorities to your Honor which I can do very briefly now.

On the subject of cross-examination of an expert by the use of a textbook, the case of American Pacific Whaling Company vs. Christenson, a case from this circuit, the Ninth Circuit, decided in 1937 by the Court of Appeals recorded in 93 Federal 2d, page 17, says this, and I quote from page 21:

"Passages from textbooks were read to a witness on cross-examination. Defendants assigns this as



(Testimony of Frank Momyer.)

improper. This was permissible to test the knowledge, accuracy and credibility of the witness."

McBane's California Evidence, Manual 1945 on page 294 states:

"Cross-examination reference to learned treatises. On cross-examination of a witness he may be asked about his familiarity with authoritative printed works on the subject and this may be done, seemingly, although he has not relied on the particular book in giving his evidence on direct examination."

The general rule is stated in American Jurisprudence in this way:

"There is a distinction between the use of medical or other scientific books or treatises in the direct examination of expert witnesses and use for the purpose of cross-examination. If it appears that the expert witness is basing his opinion in whole or in part on authority of medical or other scientific works, counsel may in cross-examination interrogate the witness or cross-examine for the purpose of discrediting him."

There is an early California case which says where a medical expert took the stand and merely said, "This is my opinion," that it would not be permissible to examine him with respect to textbooks to the contrary, although in that case the Court pointed out that it did not find anything contrary in the books to what the witness had testified to so that there was another ground on which the case went, and that was quite an old case and we have

(Testimony of Frank Momyer.)

been unable to find any later authority except McBane who states the rule to the contrary.

I also call your Honor's attention to the Federal Rules of Civil Procedure, Rule 43, from which I read:

“(a) Form and Admissibility. In all trials the testimony of the witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under [15] the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction in the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made.”

If your Honor will refer to the notes of the Supervisory Committee in connection with that rule, the note to that subdivision reads as follows:

“The first sentence is a restatement of the substance of the United States called Title 28, Section 635 and 637. . . . The second and third sentences on admissibility of evidence and Subdivision (b) on contradiction and cross-examination modify United States Code Title 28, Section 725 insofar as that statute has been construed to prescribe conformity to state rules of evidence.”

(Testimony of Frank Momyer.)

In other words, under Rule 43 the Federal Court will follow the rules of federal jurisdiction rather than relying on the state of rules; and it is obvious from Rule 43 that the tendency of the Court is to give a liberal scope to the cross-examination. [16]

The Court: As a matter of fact, didn't you read from the book?

Mr. Levit: Yes.

The Court: I said I wanted to hear about it anyway.

Mr. Levit: But I did not pursue it as far as I intended because of your Honor's opinion of the law.

The Court: I will reverse my opinion and you may proceed.

Cross-Examination  
(Resumed)

By Mr. Levit:

Q. Mr. Momyer, you are familiar, are you not, with the work by Montgomery entitled "Auditing Theory and Practice"?      A. Yes, sir.

Mr. Whittaker: If it please the Court, may I make this objection to this line of testimony? This is seeking or leading to theories upon what text writers have said with respect to accounting principles, which as applied to the case at bar relates solely to questions of law and therefore would be argumentative with any witness and invading the province of the Court.



(Testimony of Frank Momyer.)

Mr. Levit: May I make just a brief comment on that?

The Court: It may or may not be true. I want to admit the evidence on this point anyway, because it seems to me that in determining what loss or profits are, you have got to adopt certain theories. They are inherent in the question just as in the question of determining the value of a piece of property, [17] which is a matter of opinion. In the same way when you determine what the profits are, you must adopt a certain test, and if you adopt one theory of accountancy we may be passing on a question of law, but it seems to me when you appoint appraisers to determine what profits are, you certainly expect them, and it is implicit in the appointment of them that they will have to adopt some theory of accountancy.

Mr. Whittaker: I do not disagree with that, but what I am saying is that when we get to the matter of discussion of law that the courts have already faced that matter by judicial decision. That is what I am saying.

The Court: That may be.

Mr. Whittaker: Counsel made that statement yesterday that there was not a single case in our brief submitted to the court that touched that question. Your Honor, that was a brief on the law of appraisal. I have one here now that covers these matters that I propose to submit at the conclusion of the trial.

(Testimony of Frank Momyer.)

Mr. Levit: If this question were submitted to the Court, and had there been no appraisal and the parties could not get together, there is not any doubt but that the Court would have to decide what accounting rule, in order to determine the proper allocation of profit and so forth. But this was not submitted to the Court. It was submitted to the appraisers and the only question is to find out whether the appraisers decided in accordance with established and recognized principles, or if they did [18] not.

If counsel says principles of accounting are established by decisions of law, he is mistaken. The only decision he has recited with regard to the allocation of profits is a decision entirely in favor of the method adopted by the appraisers; but we will argue that at another time.

The Court: It seems to me that all the appraisers can do is to determine a question of fact; but when you determine a question of how much profit you have made, it is implicit that you have to take into account some form of accountancy.

Mr. Whittaker: That's right, in the memorandum of four pages Mr. Withers in evidence as Defendant's Exhibit No. 3, that tells the appraisers that as respects questions of law they are to compute the facts each way so that the question of law can be determined otherwise. They are not to resolve questions of law.

There is one more observation I should like to

(Testimony of Frank Momyer.)

make to your Honor in this connection. Counsel for plaintiff has stated yesterday frankly and in a lawyer-like manner that in the determination of profits you must have actual realizations, and of course, that is the law.

Mr. Levit: I did not say that, counsel.

Mr. Whittaker: I so understood you.

Mr. Levit: I said it was an accepted principle of accounting that normally books should not reflect a realization [19] of profit that has not yet actually been received. I did not say it was impossible in accountancy to determine profit or allocate profit between different departments of a business without first selling——

The Court: Of course, this is a situation where you haven't anything to sell. You have to determine what your profit would have been if you had been able to operate.

Mr. Whittaker: That is true as to profits generally, but as to the box factory it was all sold, and we know what the realization was there, 62.20 a thousand, and we are talking about the realization of profit from the box factory.

The Court: That is right.

Mr. Levit: No, we are talking about the allocation of profits on what went through the box factory as between the box factory operation and the other operation.

The Court: I understand. I am going to allow this line of questioning, and it may be deemed, counsel, that you have an objection to all of it.

(Testimony of Frank Momyer.)

Mr. Whittaker: Thank you, your Honor.

Q. (By Mr. Levit): I call your attention to page 436 of that work from which I am going to read briefly.

The Court: What is the name of that work?

Mr. Levit: "Auditing Theory and Practice (6th Edition, 1940; Ronald Press)" by Montgomery, and I am reading from page 436: [20]

"Interdepartmental Profits. In departmental accounting the practice may be followed of passing the completed product of one department of the business to another department for further processing at a so-called selling or current market price. To the extent that the market price is in excess of cost, a profit is taken into account immediately.

"The primary purpose of passing products between departments for progressive processing at the current market price at the stage of completion is to show departmental results on an independent basis. . . .

"The practice of charging separate departments of a business with market rather than with cost prices may be good departmental accounting, but the interdepartmental profits should not be reflected in the statement of income for the business as a whole until the product is finally sold."

Q. It is a fact, is it not, Mr. Momyer, that is precisely the method that was followed by Pickering in connection with its own accounting?

A. With the interdepartmental or for manage-

(Testimony of Frank Momyer.)

ment purposes, but not for calculation of true profits.

Q. Certainly, just as Montgomery says, when you came to making up your statement as a whole, you didn't reflect any departmental profits at all; you only reflected the ultimate profit, didn't [21] you? Right? A. Right.

Q. On page 159 with reference to allocation of costs based upon sales, Montgomery says:

"When more than one product is obtained from the same raw material, arbitrary methods must sometimes be used to apportion the cost to several products."

Do you agree with that?

A. I don't say that I do.

Q. You don't think that you do?

A. No, sir, not when as stated yesterday that it is quite evident from the facts that lumber selling for \$100 a thousand and lumber selling for \$50 a thousand, it just is not true the \$100 lumber cost just twice as much as the \$50 lumber.

Q. Let me read to you, further, what Montgomery says:

"The proceeds of the sale of by-products are usually applied against the cost of production of the main product. In some industries, for example, lumber, in which products of more than one grade are obtained by a common operation, the cost allocated to any one grade is more or less arbitrary. It is regarded as good accounting practice to assign



(Testimony of Frank Momyer.)

higher costs to more valuable products and lower costs to less valuable products, even though the apparent cost of production units may appear to be the same." [22]

Do you agree with that statement?

A. No, I do not, for the same reasons stated before. In the first place, the box factory is not a subsidiary operation to the lumber operation. All we do is just cut the big boards into smaller boards and package them and ship them out so that they can be made into boxes. We don't make the boxes at all. We just saw the big boards into little boards and that is just a further processing along the line and it is not a finished product until it is loaded on the cars and shipped as shook or the big board as lumber. There is no by-product involved.

Q. No by-product, but it is the joint product situation rather than the by-product?

A. That is correct.

Q. That is what Montgomery is speaking about, the joint product accounting method of allocating costs when he is talking about the lumber industry, isn't he?

A. No, sir, I think he goes farther than that. He talks about by-products and so forth. Some operations have by-products that we don't have. They make something out of the bark or make something out of the sawdust, maybe. They make these bricks that are sold for fuel. There are various by-products that might be made in the mills,

(Testimony of Frank Momyer.)

but we are talking about a product that is made from boards and there is no difference between the big board and small board except you saw them smaller.

Q. Even though you don't agree with Mr. Montgomery that it is good accounting practice to use an allocated cost in such cases as the lumber industry, you do agree, do you not, that the United States Government Treasury regulation with reference to income tax matters recognizes the allocated cost method and that Pickering was required to use it in connection with the pricing of his own inventory?

A. For income tax purposes, yes, sir.

Q. All right.

A. And I call your attention to the fact that if you are talking about allocated costs on the true basis of allocated costs, then in our case the allocated cost to the box factory would be much higher than the average cost that we have claimed in our claim because the product sells for more as box shooks than as the big boards in lumber, so you would allocate the higher cost to the——

Q. Well, we will come to that. But at the moment I would like you to refer to the question on determination of cost as compared with the determination of market.

In Montgomery's book on page 160 under the title "Vagueness of term 'Cost'," he states:

"We refer to 'single cost' as if it were an exact term and not to be compared with the illusive word 'market.' Yet experienced accountants often find

(Testimony of Frank Momyer.)

it more difficult to determine costs than to determine market, [24] even when all factors are known. Except when specific identifiable purchased units are on hand, it is necessary to make some assumption in determining the cost of the items comprising the inventory. The essential point which the auditor must always keep in mind is that though one procedure is sacrosanct, any accepted method which clearly reflects income in any business or industry is a proper method.

Do you agree with that statement?

A. I think so, and certainly the method that we use is as much accepted as the allocated cost method.

Q. Now, I refer you to a book entitled "Introductory Cost Accounting," by Gillespie, which was published by the Ronald Press in 1941, the revised edition being published in 1941.

It is true, is it not, that the Ronald Press is recognized as being a publisher of textbooks and recognized works on accountancy?

A. Yes, and many other subjects.

Q. They published the Montgomery book, as a matter of fact, did they not, do you know?

A. I think that is correct.

Q. Now, referring to page 268 of that book, I am going to ask you if you agree with this statement:

"Distributing cost prior to split-off: value basis. In distributing cost to point of split-off, some basis should be selected which will charge each of the



(Testimony of Frank Momyer.)

joint products with an equitable share of cost. One common basis is 'market value of the products.' Under this basis, cost prior to split-off is distributed according to value of finished product yielded."

You agree that is one method of determining cost?

A. They are talking about interdepartmental procedure; we have talked about here as being primary for management purposes to see whether they should cut off some portion of the manufacturing because it is not making money for them.

Q. As a matter of fact, Mr. Montgomery says that is a recognized method of determining the cost of the production of a joint product such as lumber, does he not?

A. I don't remember what Mr. Montgomery says.

Q. Isn't it a fact that aside from the fact that Pickering itself did this in pricing its own inventory at the insistence of the Federal Government, that that is common practice in the lumber business?

A. No, they didn't say it was common practice, as I recall. The way that happened, counsel, if you are interested, is that the agent continuously read my Prentiss-Hall books on tax matters and he ran into a case in Los Angeles, I believe it was, where they asked allocated costs be used. The book did not give the history of that case, and he jumped at the idea that all lumber accounting should be on that basis for income tax purposes. But [26] the

(Testimony of Frank Momyer.)

truth of the matter was that the man had been told that because he was not using any method of cost where he got to a point where the market value was less than cost he would use that. Where it was higher he would use cost. He was not following through on any procedure and in that particular case he was told to use an allocated cost. The agent didn't go into that and he took that cue to say all lumber accounting should be done on that basis and he took the position that he was not going to settle our case unless he did that. But I don't understand that all lumber accounting was on that basis. In other words, he was up there a long time before he discovered this case in the book and he didn't say a word about allocating the cost until he had read that and he discovered in that case they had used allocated cost, and if it had been commonly used in the lumber business he would have known that without stumbling on it in the textbook of Prentiss-Hall.

Q. You deny, Mr. Momyer, that it is universal or it is the common practice in the lumber business in costing products on remanufacture operations to cost them in at market?

A. I do not. I have repeatedly said we do it for management purposes and most of them do, but they washed it out when they came to profit and loss statements as we do.

Q. Certainly, because when they make up their profit and loss statements they do not make any

(Testimony of Frank Momyer.)

distribution of accounts as between departments, do they? [27]      A. Certainly not.

Q. And it is true, is it not, that during the O.P.A. period, that is the period while the O.P.A. prices were in effect, that it was the universal practice in the lumber business in costing products into remanufacturing operations such as box factories, to do that at the O.P.A. ceiling price?

A. I do not admit that the box factory is a remanufacture operation on the basis we conduct it.

Q. I will withdraw the question. Do you deny that during the period the O.P.A. was in effect, it was universal practice in the lumber business, or at least the very common practice to cost lumber into a box factory where the lumber was produced by the same mill at the O.P.A. prices to determine market value or value-in-place?

A. I can't say that I know it was generally used, that O.P.A. prices were generally used. I know one of our neighbors that uses just an arbitrary basis. I expect that a number of companies would use that basis for the same reason we did for telling whether that department was profitable to operate or not.

Q. You spoke of the fact that the revenue agent made use of one of your textbooks written or published by Prentiss-Hall. Prentiss-Hall, of course, is also like the Ronald Press recognized as a publisher of reliable accounting books and other technical service? [28]

(Testimony of Frank Momyer.)

A. They sell you a service that gives you tax information.

Q. It is a fact, is it not, that this question of making up an operating statement, or even a balance sheet for a given period, that is, a fixed beginning and a fixed ending, is necessarily a matter of estimate and not a matter of being able to say that it is completely correct, isn't that right?

A. I don't know that I understand your question.

Q. Don't you agree with this statement which I am reading from a book published by Prentiss-Hall in 1948, the name being "Principles of Accounting," by Finney, third edition, 1948:

"Periodical balance sheets and operating statements can rarely be statements of absolute fact, and therefore cannot be regarded as correct in any absolute sense. Usually they can be no more than a mixture of facts, estimates and opinions. Since accountants may honestly differ in matter of estate and opinion, different statements may be made and defended by different accountants."

Do you agree with that?

A. I would say there are certain items you have to estimate; depreciation, for instance. Nobody can measure that out in a gallon bucket and say that is it. You have to make some estimate, and one party might say one rate was applicable and another party might take another position. So to that extent there are certain estimated items; but there

(Testimony of Frank Momyer.)

are also a lot of items that are developed from actual cash expenditures, actual dollars that [29] are spent.

Q. But specifically referring to the claim that was presented by Pickering in this case against these insurance companies, there is no doubt in your mind that on the overall picture and with respect to many of the items that made it up it was a matter of estimate and not a matter of sheer factual proof?

A. You certainly couldn't have actual profits established because you didn't have any operation, but we took the best evidence that we had of the profit that would have occurred for twelve months following the fire which in this case was the preceding fiscal year, and we had ceiling prices in effect as stated yesterday, and things seemed constant throughout the entire period and it was thought by all parties concerned that would be a fair measure.

Q. When you say "was thought by all parties concerned" that the basis or theories on which you made your estimate was a correct one, you don't mean to include the appraisers and the insurance companies, do you?

A. I am using the test year that was agreeable to all concerned at the time.

Q. You mean to the insurance companies?

A. Yes, they didn't challenge the use of that test year.



(Testimony of Frank Momyer.)

Q. Oh, no, they didn't challenge the use of that test year, but in the determination of the amount of profit that the box factory made, insurance companies differed very materially with [30] your thesis on which you built your claim, didn't they?

A. I didn't mean to say——

The Court (Interrupting): He did not say they did not. He said both sides agreed on the test years.

Mr. Levit: Certainly, I am sorry; I misunderstood.

Q. Now, just one more text reference, Mr. Momyer. I am going to ask you if you agree with this statement of Mason in "Fundamentals of Accounting," published in 1942 by the Foundation Press. Are you familiar with that book?

A. Yes, I think I have read some books on that—I don't remember. Whether I have read that particular book or not, I don't remember.

Q. I will ask you if you agree with this statement on page 275:

"Conclusion as to the limitations and purposes of cost accounting.

"Limitations of cost accounting. The primary service of cost accounting is not, paradoxically, the determination of the cost of producing or distributing each unit of production or service. The prevalence of joint costs both in production and selling makes it impossible to compute the cost, in an absolute sense of any single unit. Most modern



(Testimony of Frank Momyer.)

plants produce more than one product with the same buildings, equipment and labor force. The whole problem of overhead or process cost distribution over departments, the redistribution of service department [31] costs, and the allocation of burden to particular jobs or products is characterized in large part by the use of arbitrary and crude bases."

Do you agree with that?

A. I think that is referring to this interdepartmental procedure.

Q. Do you agree with Mr. Mason's statement on page 277 that:

"Production costs records are necessary in order to obtain unit costs which can be used for the calculation of cost of goods sold and the value of inventories. Although never more than approximately correct, they provide a systematic mechanism for accounting for the flow of costs through the plant and on to the customers."

Do you agree with that statement that production cost records are never more than approximately correct?

A. I don't think they can be absolutely correct for reasons stated a while ago, that some items like depreciation must be estimated.

Q. Referring to the appraisal, you recall that there was introduced in evidence yesterday Plaintiff's Exhibit N which was a letter written by

(Testimony of Frank Momyer.)

Pickering to the appraisers demanding a hearing, do you recall?      A. I do.

Q. It is a fact, is it not, that the Pickering Lumber Company got from the appraisers a full opportunity to present all of its [32] facts, figures and arguments?

A. I believe that is true.

Q. And also to hear and to rebut the facts of the arguments presented by the insurance company?      A. To rebut?

Q. To hear and an opportunity to rebut the facts and arguments presented by the insurance company?

A. We might have had the opportunity, but I don't believe we did. They presented their side of the picture and we presented ours and we went on our way and let the appraisers consider the question.

Q. As a matter of fact, had you wished to present any further evidence there is not the slightest doubt in your mind that if you had desired to present any further argument that the appraisers would have permitted you to do so?

A. I believe they would.

Q. At no time during the course of this appraisal did you ever offer or seek permission to offer or present any evidence that was in any way rejected or declined or refused by the appraisers, isn't that true?

A. We did not; that I know.

(Testimony of Frank Momyer.)

Q. At the time of these hearings that were held by the appraisers, all three of the appraisers were present, were they not?      A. Yes, sir.

Q. And all of them were attentive and paid close heed to the [33] arguments on both sides and the facts presented by both sides, isn't that so?

A. I think so.

The Court: That is looking into the appraiser's mind. That calls for his opinion and conclusion.

Mr. Levit: I mean, he had no feeling that they were looking out the window or not paying attention to what the Pickering Lumber Company had to say.

The Court: I think some well-known judge has said that the hardest thing for a judge to do is to look as if he was listening and not be listening.

Mr. Whittaker: Of course, your Honor, I believe we are quite a long ways afield. All the issues here are delineated by the pleadings and those are the only challenges we make on the award.

Q. (By Mr. Levit): The appraisers, Mr. Momyer, did not actually examine the underlying books and records of the Pickering Lumber Company, did they?      A. They did not.

Q. At no time during the course of the hearing or prior to the award were they requested to do so by the Pickering Lumber Company, or by the others, were they?

A. They were not requested to do so. They were

(Testimony of Frank Momyer.)

invited to come to our plant and our office and make any inspection of the books or records in the operation or do anything they wanted to [34] do. They did not, however, come to our plant.

Q. As a matter of fact, it was generally conceded by both the insurance companies and the appraisers that the figures, reports and the audits and the claim presented by Pickering Lumber Company truly depicted or that they purported to depict what was correct so far as Pickering Lumber Company books were concerned?

A. I believe it was just a different way of handling the figures.

Q. It was a question of applying different accounting theories to the figures, is that correct?

A. Yes, that's correct.

Q. Now, Mr. Herrick who was one of the appraisers and who was selected by Pickering Lumber Company to act on this appraisal is the Mr. Herrick who is a member of the firm of Lester, Herrick & Herrick?

A. That is correct.

Q. It was true at that time and also at the present time that is one of the outstanding C.P.A. firms in San Francisco?

A. I believe they are.

Q. It is also true, is it not, that Mr. Herrick's firm handles a goodly amount of lumber business from the C.P.A.'s viewpoint?

A. I am not familiar with their practice. They

(Testimony of Frank Momyer.)

do handle some lumber accounts, I am sure, but not as many as Robinson & Nowell.

Q. Mr. Lilley who was selected to be umpire in this matter, was [35] and still is a senior partner in the firm of McLaren Goode & Co., isn't that so?

A. I understand he is, yes. I met neither of these men prior to the appraisal, and I don't know much of their background.

Q. You do know, however, that McLaren Goode & Co., like Lester, Herrick & Herrick is one of the outstanding C.P.A. firms in this district?

A. I do.

Q. Are you aware of the fact, Mr. Momyer, that it was Mr. Herrick who selected and nominated Mr. Lilley to act as the umpire in this matter as his first choice?

A. I do not know personally. I have read the testimony of Mr. Herrick and I believe that statement was made but I do not know personally who they considered and who selected the umpire or how they did it.

Q. It is a fact, isn't it, do you recall, that the question of the matter of whether the witnesses should be sworn or not was brought up in the hearing and everybody present agreed it was unnecessary?

A. I do not remember that that question was asked.

Mr. Whittaker: Herrick said nobody asked they be sworn and there was no discussion about it.



(Testimony of Frank Momyer.)

Mr. Levit: So we will get the record straight on it, I will refer to Mr. Herrick's deposition on page 94, lines 19 to 23: [36]

"Q. Was any objection raised by either party at the hearing to the informal method or procedure you followed in permitting the testimony to be taken without oath?

"A. No objection was raised. I have forgotten whether or not the question of swearing the witnesses was raised. I have a very indistinct recollection that it was and that it was agreed that placing them under oath was not necessary."

Then on the next line he says:

"Frankly, my recollection isn't clear." And then he says, "It is true, is it not, that had either party requested or insisted that oaths be administered you would have so proceeded?"

"A. Certainly."

Q. (By Mr. Levit): But you don't recall whether the point actually came up, Mr. Momyer?

A. I don't believe it was mentioned, although I could be wrong. It has been a long time ago.

Q. In addition to proof of claim and your other data, you furnished the appraisers from time to time both during and after the hearing with, I believe you testified, the various Robinson-Nowell reports, that is, the reports of Pickering's auditors covering various periods at various points, isn't that so?

A. I believe they had those. We first gave them



(Testimony of Frank Momyer.)

our proof of loss and then I believe they did ask for those and we made them available to them.

The Court: We will take a ten-minute recess.

(Recess.) [37]

Mr. Levit: Mr. Momyer, I have handed you Plaintiff's Exhibit W, which is an analysis made by Mr. Herrick shortly after the commencement of the appraisal of the differences between the position taken by the Pickering Lumber Company with respect to its claim and the position taken by the insurance companies with respect to the claim. I will ask you if you ever saw that document before?

A. Yes, sir.

Q. And it is true, is it not, that the document fairly and accurately reflects the points of dispute between the two parties to this appraisal as they were presented before the appraisers, in large part?

A. I believe that is true.

Q. Now, in other words, then, there were listed on these three sheets, these three accounting sheets attached thereto, or comprising this Exhibit W, many items shown on here where the parties differed as to the details which should properly go to make up this claim, isn't that so?

A. There were a number of items, yes.

Q. Yes. And in resolving the problem presented to them, it is true also, is it not, that the appraisers did not settle all of these points of difference in favor of the insurance companies or

(Testimony of Frank Momyer.)

of Pickering, but that rather the final outcome was one wherein as to some of the differences the insurance companies succeeded and as to some of the differences the Pickering [38] Lumber Company succeeded; isn't that so?

Mr. Whittaker: If the Court please, I object to the question for the reason that it calls for an interpretation of the document in evidence.

Mr. Levit: Which document?

Mr. Whittaker: This exhibit that you are referring to.

The Court: I don't think it does, Mr. Whittaker, because he asked after that, what was the conclusion afterwards, what occurred afterwards, and what the appraisers did afterwards with respect to the various differences. He doesn't ask about the contents of that document in that question.

Mr. Whittaker: Well, it does—Then I should say, it calls for an interpretation of evidence already before the Court from the appraisers themselves as to what they did.

Mr. Levit: Your Honor, this witness has testified in detail, he was asked on direct examination about various points as to which the claim differed from the award of the appraisers. Now there is in evidence this large statement of differences, and we wish to show, and I believe in fact that counsel will stipulate to it, that in the resolution of the problem presented to the appraisers, the overall

(Testimony of Frank Momyer.)

problem of this claim, and in reaching their award, the appraisers decided some of these differences, these points of difference, in favor of Pickering and decided some of them in favor of the insurance companies. Is that not so? [39]

Mr. Whittaker: Well, in one sense, yes. In another sense, no. The facts are that the testimony of Mr. Herrick and of Mr. Maloney and of Mr. Lilly already before the Court shows precisely what they did, and I do not think it is for us now to attempt to interpolate what they did. Their testimony speaks for itself, in other words.

Mr. Levit: That is not correct, your Honor, because the testimony was largely limited to the claimed points of error on which Pickering was unsuccessful in their own view, so far as the appraisers were concerned. What I am trying to establish now is that in the overall picture,—

The Court: It resolves some of the differences in favor of Pickering and some of them in favor of the insurance company.

Mr. Levit: That's right.

The Court: Well, I think that that might be apparent from the fact anyway, and I will allow the question.

Q. (By Mr. Levit): That is correct, is it not, Mr. Momyer?

A. I have no information on everything they did, but I believe that must be a fact, but they arrived somewhere between the two figures. That is, they arrived somewhere between the proof of loss and the

(Testimony of Frank Momyer.)

figures established by the insurance companies.

Q. Well, now, as a matter of fact, you recall, do you not, that Mr. Herrick pointed out that although the determination by the appraisers of the salvage from the box factory operation distressed Pickering, that actually Pickering was allowed and set up in its claim, a considerable amount of depreciation, which, as Mr. Herrick said, could never have been sustained had the insurers made objection to it. Do you recall that?

Mr. Whittaker: Now I object to the question for the reason that it is attempting to interpolate some statement made by another witness, and trying to ascertain what he meant by that testimony.

The Court: Well, I think that the objection is good.

Mr. Levit: You sustain the objection, your Honor?

The Court: Yes, I think so.

Q. (By Mr. Levit): Now, I suppose you still have, Mr. Momyer, a copy of the proof of loss, which is Exhibit D; and I will ask you, referring to that exhibit, to tell us, please, what was the amount claimed of the total amount of profits presented based on the fiscal year, March 31st, 1945, on an annual base. A. \$358,456.56.

Q. Now it is a fact, is it not, that that figure was based on the fiscal year ending March 31st, 1945? A. That's correct.

Q. And that it is made up of two items; namely, an item of trade and company use lumber, of

(Testimony of Frank Momyer.)

\$111,840.73 and of box factory lumber, or operations, of \$246,617.83, which totals——

A. I have been unable to find that anywhere in the proof of loss, counsel. I cannot find that.

Q. I am going to show you Plaintiff's Exhibit X for identification [41] (handing to witness). I call your attention to the first series of columns headed, "proof of loss," and to the first item, "profits prevented due to loss of production," and "(annual base) (based on fiscal year 3/31/45)"—a total of \$358,456.56. This figure is the figure which you just stated was the amount of profits presented on the annual basis, is it not?

A. That is correct, but that isn't the question you asked me. You asked me about \$111,840.73 and \$246,617.83.

Q. I am asking you now to look back at the two preceding figures, which total that \$358,456.56 figure and ask you if that is not correct, that the \$358,000 figure was made up, so far as your claim was concerned—whether it appears in the printed proof of loss or from some other place that you may have taken it—of the two figures shown immediately above on Exhibit X for identification?

Mr. Whittaker: Now, if your Honor please, I would like for the purpose of the record to make the objection that counsel is attempting to interrogate this witness about an exhibit which he himself prepared and which is not in evidence and is hear-



(Testimony of Frank Momyer.)

say, and not proper for consideration here, nor for use in the interrogation of this witness.

Mr. Levit: May I reply?

The Court: Well, you can revamp your question by just asking him if that amount of \$358,000-odd wasn't made up of [42] these two sums.

Mr. Levit: That is what I asked him first, your Honor; I thought I did, anyway.

The Court: Well, you don't need to show him in a document that is not in evidence; just ask him.

Mr. Levit: Yes. I would like to point this out to your Honor, that the defendants themselves introduced in evidence on the deposition of Mr. Herrick this so-called document known as the "final revised computation," which attempts to make a comparison between the claim and the award. Now if it is proper for the defendant to do that, it is proper for us also to do the same thing, and we believe that this will be very helpful if we can do so.

The Court: I think that the Court can use it in the sense of being part of your argument.

Mr. Levit: That's right. That is all I wanted for, your Honor. But counsel won't let it in. Otherwise we could have foregone this question.

The Court: Whether it is admissable in view of their objection and their claim that it is inaccurate, of course I couldn't admit it, because there is no foundation laid for it.

Mr. Levit: Well, in order to shorten this, I will abandon this line of questioning, and will use this in argument.



(Testimony of Frank Momyer.)

Mr. Whittaker: I want to state now for the record, I have [43] no objection whatever of his asking the witness concerning any figures he desires to ask him. My objection goes to the point of his attempting to show the witness an exhibit which he prepares and which I have stated to your Honor earlier we find not to represent the facts with respect to the figures contained in the proof of loss.

The Court: Well, of course, he is attempting to bring out the fact that they do represent the fact contained in the proof of loss.

Mr. Levit: That's right.

The Court: And while it may be improper for him to show the witness a document that is not in evidence, on the other hand he can ask him about the figures in that document.

Mr. Whittaker: That is right.

The Court: In other words, there is a sum of \$358,000 made up of two other sums; one sum the witness has already admitted.

Mr. Whittaker: The total.

The Court: The total he has admitted, and haven't you admitted the one of those figures, the subsidiary figures?

The Witness: No, I have never seen either of the two figures there. I don't know where they came from. I can't find them in the proof of loss or anywhere. This column is headed proof of loss, and I can't find it anywhere in here (indicating).

Q. (By Mr. Levit): Well, at any rate, it is

(Testimony of Frank Momyer.)

correct, is it not, [44] that in arriving at the figures of profits prevented of \$358,000-plus, you calculated the amount of profit to be made on the trade and company use in one category and the profit normally to be made in a year on the box factory use in the other category, didn't you?

A. Well, we will put these sales all together here, the schedule is set forth on page 3 here, where the sixty-six eight-six came from which produces the \$358,000. But I cannot find any identification for these two figures. We have the sales here from the box factory and the lumber.

Q. All right. Then you can't identify the detail making up the \$358,000?

A. No, I don't find it in the proof of loss anywhere.

Q. All right. Now coming down to the next item in the claim column, the total of the fixed charges of the profits prevented—I am sorry—the next item in the claimed column is the amount of fixed charges and continuing costs on an annual basis projected from the actual nine months after the fire. That amount was, was it not, \$646,190.47?

Mr. Whittaker: I object, for the reason that he is again referring to columns in this schedule which he himself has prepared.

Mr. Levit: I will reframe the question. And I might say to your Honor——

The Court: I don't think—I will overrule the objection.

(Testimony of Frank Momyer.)

Mr. Levit: I might say that I want to pursue this, as long as counsel says these figures are incorrect.

The Court: What is that last item again, the——

Mr. Levit: The item of fixed charges and continuing costs, that would have been earned normally in the year following the fire, was the amount, according to the claim, of \$646,190.47, was it not?

The Witness: That is correct. That is found on the summary of the claim—six forty-six one ninety forty-seven, being for the year period July 8, '45 to July 7, '46.

Q. (By Mr. Levit): All right. Now it is also true, isn't it, that the total of those two figures was \$1,004,649.03, as shown by the proof of loss?

A. That's right.

Q. And that is the figure that was allowed—or claimed, I should say—as the so-called insurable values?

A. That's correct.

Q. Now, then, it was necessary, was it not, in order to calculate the amount of the actual loss of net profits and continuing charges, to reduce the twelve months' base to a nine months' base, is that not correct?

A. Correct.

Q. And in order to do that in the claim, Pickering calculated the amount of the profits, fixed charges and expenses that were [46] applicable to the period of the last three months of this annual period, is that not right?

A. That is correct.

Q. In other words, it was done by a process of

(Testimony of Frank Momyer.)

subtraction; you first calculated it for a year, and then you took out the last three months, and by that you got the period of the nine months before the fire, right?      A. That is correct.

Q. And the figure that the proof of loss uses for the three months, which was deducted, is \$199,479.50, is that not so?

A. That's correct, but the breakdown of that item that you have used here is entirely incorrect.

Q. All right. We will mark, then, the items on this that you cannot identify.

A. I can identify those (indicating).

Q. Pardon me just a minute.

A. The caption is not correct.

Q. All right. Now you don't identify this figure. I am going to check them. Will you watch me please? I am going to put a little check mark after the figures you don't identify.

A. You are talking about the dollars there.

Q. You said you couldn't identify these three, didn't you?

A. I said I couldn't identify the \$111,000 you asked me about, or the \$246,000.

Q. That's right. And of course that would be true of the detail [47] precedes it, wouldn't it?

A. It would be true of this unit of cost you talked about, which I don't know what it means. I don't know what the unit of cost means here (indicating).

(Testimony of Frank Momyer.)

Q. All right. You don't identify this figure of six sixty-eight, do you? A. Yes, I do.

Q. You do?

A. I identify this total, because it appears in the proof of loss. It is the breakdown you make there (indicating).

Q. If I understand you correctly, then, going back to the profits prevented on the annual base, before it says "total" on the fourth or fifth line from the top of Exhibit X for identification, you can identify all three of those figures shown in the proof of loss column?

A. Fifty-three million six hundred seven nine thirty-four, correct. Fifty-three million six hundred seven nine thirty-four feet.

Q. I see. Correct.

A. Six sixty-eight, six sixty-seven. That is carried out five places. \$6.67 plus.

Q. That is the unit cost, isn't it?

A. No, that is the profit per thousand.

Q. All right, the profit per thousand.

Mr. Whittaker: May the record show—I don't know that [48] it does—that what is being done is that counsel for plaintiffs is standing before this witness with this Exhibit X in his hand and is interrogating the witness therefrom?

The Court: That's right. And when the record shows that reference is made to "this," "that," and the other, they are referring to Exhibit X for identification.



(Testimony of Frank Momyer.)

Mr. Levit: That is correct.

Mr. Whittaker: Yes, your Honor.

Mr. Levit: And you also identify, of course, as you have already testified, the amount column total of \$358,456.56? A. That is correct.

Q. All right. Now you have already identified the next item, of \$646,000-plus, haven't you?

A. Six forty-six one ninety forty-seven appears in the proof of loss in the summary.

Q. And you have identified in the claim or proof of loss the next total item of a million and four thousand dollars plus; correct?

A. One million four thousand six forty-nine 0 three.

Q. Now do you also identify the total of the three months' allocation of charges and expenses and profits to be deducted in order to arrive at the loss of these two items for the loss period of nine months; namely, \$199,479.50?

A. I can arrive at that total, but not the two items that you use in making up that total. [49]

Q. In other words you cannot identify the two items which I am now checking? (Indicating.)

A. I can identify them, but you call them "logging, use, profits, fixed charges and expenses applicable to the period of 4/7/46 to 7/7/46," three months' period, and then you show "logging" and "lumber," with a bracket, indicating that ninety-two two sixteen ninety-six of that amount applies to



(Testimony of Frank Momyer.)

that. Well, I call your attention to the fact that ninety-two two sixteen ninety-six——

Mr. Levit: Let the record show that the witness is reading from page 2 of Exhibit 2 attached to the proof of loss, schedule I.

Q. In other words, you do have in your proof of loss the very figure that we have in the proof of loss column in that category we have just referred to, of \$92,216.96, correct?

A. You call that “logging” and “lumber,” and it is not that at all. It is——

Q. Well, now——

Mr. Whittaker: Let him answer, if the Court please.

Mr. Levit: I am sorry, I didn’t mean to interrupt.

The Court: You call it “logging” and “lumber,” and you were going to say it isn’t that at all?

Q. (By Mr. Levit): What is it?

A. It is the part of the annual profits that apply to that three months’ period. The annual profits from the whole operation. [50] That part of the three fifty-eight four fifty-eight fifty-six that goes in the three months’ period. It has nothing to do with any particular department at all.

Q. Well, you don’t mean to say that you didn’t deduct in calculating the loss for nine months, that you didn’t deduct the proper proportion of the fixed charges in continuing costs, do you?

A. I will tell you about that. Where you say

(Testimony of Frank Momyer.)

“box factory” down here, one hundred seven thousand two sixty-two fifty four, that is continuing charges, and the expenses for the three months’ period. Where you got “box factory” for that, I don’t know.

Q. I see.

The Court: In other words, what he is telling you, Mr. Levit, is that that amount of \$199,000 is divided into two amounts, \$92,000 for the three months’ period as far as the profits are concerned, and one hundred odd thousand dollars for the three months’ period as far as expenses and so forth are concerned.

Mr. Levit: Fixed charges, we will call them.

The Witness: That is exactly right.

Q. (By Mr. Levit): That is “C” and “CE,” and continuing—fixed charges and continuing expenses here (indicating)? A. Yes, sir.

Q. Now, then, you will note— [51]

The Court: Your Exhibit X is wrong in your description of those amounts, not in the amounts themselves.

Mr. Levit: That’s right.

Q. Now, then, if you will notice the words I have written in in pencil opposite these two figures that go to make up a total of \$199,000, then this exhibit, if we take that, correctly portrays your claim on that point, does it not?

A. If you will strike “logging,” “lumber,” and “box factory.”

(Testimony of Frank Momyer.)

Q. Yes. I won't strike it, because it still applies to the other two columns. But so far as your claim column is concerned, that is to be changed, is that right?

A. That's right. It has nothing to do with logging, box factory, or lumber, strictly.

Q. All right. Then you arrive finally by deducting the three months from the year base, at a figure of fixed charges, and continuing costs plus profits prevented for the so-called loss period that would normally have been earned in the nine months after the fire, of \$805,169.53, is that not correct?

A. Eight 0 five one six nine five three appears on the summary of the claim in the proof of loss.

Q. Then you calculated the salvage values, did you not?      A. Correct.

Q. And in the category of logging, you calculated a salvage gross of \$60,125.19?

A. Sixty thousand one twenty-five nineteen appears across on [52] page 20 of the proof of loss, schedule Roman numeral three, and this item is supported by schedule R-I appearing on page twenty-one of the proof of loss.

Q. I mean the figure is correct, isn't it?

A. The figure is correct.

Q. And then as to box factory, you calculated the salvage at \$44,375.16, did you not?

Mr. Whittaker: If the Court please, are you using—counsel is using the term “salvage.” We do not concede that that is an appropriate term. I

(Testimony of Frank Momyer.)

don't want to be fussing about words, but what it is, is in relation to the box factory profit—isn't that what you mean, Mr. Levit?

Mr. Levit: On the last item, yes. Oh, I don't place any particular reliance on the use of the term.

Q. But the figure is correct, is it not, that amount of profit calculated for the box factory in the claim was \$44,375.16?

A. That's correct, that appears on page 20 of schedule Roman numeral three and is made up of three items: Fifty-nine thousand two forty-nine ninety-three plus three thousand three eight-five forty-three, totaling——

Q. Pardon me, Mr. Momyer. I am merely trying to identify the totals, because all we are interested in here is the total. This is not in any sense a detail, it is merely a summary of the totals.

Mr. Whittaker: But what you are doing, Mr. Levit, is to [53] characterize by your question the \$44,375.16 as the box factory profit with which we credited the claim. Now actually that is the box factory profit less the inventory replacement, of \$18,000. Am I not right, Mr. Witness?

The Witness: Correct.

Mr. Levit: When you say "inventory replacement," are you talking about the two million feet of the eight million that went through the box factory that was allowed all the way through by the companies and by the appraisers?

Mr. Whittaker: Yes, Mr. Levit, except I don't

(Testimony of Frank Momyer.)

know whether it was two million feet. I could get it for you.

Mr. Levit: Well, it was approximately two million feet.

The Court: It was approximately that, yes.

Mr. Whittaker: All right. You see, the box factory profit with which the proof of loss credits the claim is \$59,250.93. That is the \$6.71 per thousand profit, times the 8,828,644 feet of lumber put through the box factory after the fire. So I don't want any misimpression to be left here that we credit the claim with profits from box factory of only \$44,000.

Mr. Levit: That is all you did credit it with, counsel.

Mr. Whittaker: When we credit the claim with the full \$59,000 and then deduct the inventory replacement from it.

Mr. Levit: Well, it is just six of one and a half a dozen of the other. The point is that in the makeup of the [54] claim, the companies were given credit against the claimed loss, so far as the box factory operation was concerned, of \$44,375.16, the net credit.

Mr. Whittaker: The net credit, yes.

Mr. Levit: Certainly.

The Court: Well, that is the ultimate fact?

Mr. Levit: That is right.

The Court: Is that the fact?

The Witness: That is correct.

The Court: The ultimate fact?



(Testimony of Frank Momyer.)

The Witness: That is correct.

Q. (By Mr. Levit): Now as far as that two million feet is concerned, as long as Mr. Whittaker has mentioned it, the fact is, isn't it, Mr. Momyer, that the Pickering Lumber Company was claiming originally, was talking about, a claim of five million feet?

A. No, sir, we never did claim as much as five million feet that I know anything about. We claimed, I believe at one time, three million feet.

Q. Mr. Momyer, you remember testifying before the appraisers, don't you?      A. I do.

Q. I am going to call your attention—well, I will ask you this: You recall that Mr. Herrick, the appraiser appointed by Pickering, took notes at that hearing, don't you? [55]

A. I believe he did.

Mr. Levit: There is in evidence here, if the Court please, Exhibit T, which is a transcript of Mr. Herrick's notes taken at the hearing, which he testified were dictated by him shortly thereafter from his penciled notes, and that is reproduced in the transcript, and I think it is also—it may also be here by separate copy; I am not sure.

Q. I am going to read to you from Mr. Herrick's transcript, Mr. Momyer, and see if that refreshes your recollection as to what Pickering claimed with respect to how much credit they wanted to take off that profit before crediting the insurance claim with it. Page 126 of the transcript, line 20. It relates to



(Testimony of Frank Momyer.)

your testimony, Mr. Momyer, and refers to schedule R for the claim:

“Stated that the company——” and this is what you are supposed to have said, and I am going to ask you if this refreshes your recollection:

“Stated that company had used all of its lumber inventory remaining after the fire, with the consequence that the box factory could not start coincident with the sawmill. But that it was necessary to wait until the sawmill had produced sufficient lumber. Said that the mill produced about five million feet between August 1st and September 9th, when the box factory started, which was the minimum amount necessary to justify [56] starting the box factory.”

Do you recall that you did assert that five million feet was the minimum amount that you needed to start the box factory?

A. Well, if it is there, I must have said it, and I stated yesterday before the proof of loss was filed and before the mill started, we talked about inventory replacement, but no one knew how to calculate any dollar value for the inventory replacement. But our proof of loss on page 22, which was before the appraisers at that time, schedule R-4, Roman numeral three, makes a calculation of two million seven hundred twenty-seven thousand feet at six seventy-one per thousand, to arrive at eighteen thousand two fifty-one twenty, and we stood on that at that time, because we had a basis from which to make that cal-

(Testimony of Frank Momyer.)

ulation. We knew how long it was after the saw-mill started before the box factory started operating, and we had a definite basis to make the calculation. Now it may be that somewhere along the line during the preliminary discussions that we didn't know whether it would take five million or three million or two million, and maybe that figure was mentioned. That has been a long time ago. But it remains that we finally claimed two million seven twenty thousand feet and we would have been satisfied with that.

Q. And you got that, didn't you?

A. No, they didn't calculate it on two million seven twenty. I believe they used two million feet. But they got a different [57] dollar value, because they were talking about a different rate of profit. They have been using a different rate of profit.

Q. Well, actually, they used an entirely different method of calculating the profits to the box factory than you did, didn't they? A. Yes, they did.

Q. So of course they would get a different result. Now then, you deducted as salvage, or as a credit, let's say, against the claim of \$805,000-plus, the amount of \$104,500.35, which came out to a figure of \$700,669.18; that's correct, isn't it?

A. Yes, that figure is arrived at by subtraction from the other.

Q. Now, then, you also added in the so-called excessive logging costs as to which you testified yesterday, didn't you? A. Correct.

(Testimony of Frank Momyer.)

Q. And did you deduct from that the item of grazing renting, which was a very minor item but which was a contra item——

A. That was put in by mistake and taken out in that manner.

Q. Yes. That was then a total of \$41,335.23 that you added to your claim, to get the final net loss claimed of \$42,004.41, is that not correct?

A. Seven hundred forty-two oh oh four forty-one was the amount in our proof of loss.

Q. Now it is true also, is it not, that although it does not appear in your proof of claim, that you subsequently urged before the appraisers the additional claim for log stain, log [58] decking, and so on?

A. No, sir, that is entirely incorrect. It was already——

Q. Correct me, then, please.

A. It was already in the claim.

Q. It was in your proof of loss?

A. Yes, sir, I can give you the page.

Q. Show me.

A. You have arrived at a total of seven hundred ninety-seven thousand oh eighty-two thirty-five as being the total claimed by Pickering.

Q. That's right.

A. So far as I know, we never claimed an amount of that kind. The seven forty-two oh oh four forty-one is the amount claimed, and includes

(Testimony of Frank Momyer.)

the items that you have erroneously added on there a second time.

Q. Look. As far as the addition and subtraction go, if they have been correct up to this point, the \$42,004.41 does not include the claim for log stain or log decking, does it?

A. But some of your subsidiary figures do, Mr. Levit. For instance, the fixed charges and continuing expense include the log stain of thirty-six one forty-nine ninety-five as depreciation. Likewise the log decking——

Q. Now let's be specific. Which figure now?

A. This one hundred seven thousand two sixty-two fifty-four.

Q. Or the total, in other words, of 199,479.50 includes that [59] figure of \$55,000. That is your statement, isn't it, for log stain?

A. I was talking about the thirty-six thousand and the twelve thousand four ninety-two thirty-five.

Mr. Whittaker: That is the decking.

Q. (By Mr. Levit): Yes, the log stain and log decking figures. A. That's correct.

Q. And they are shown in the proof of loss?

A. They were shown in the proof of loss on page 17 and carried to page 6, and then carried forward to the summary.

Mr. Levit: If that is so, your Honor, then there has been a miscalculation in the claim column, and I will have to check that.

The Court: Well, you have duplicated it, that is all. You have added it on.

(Testimony of Frank Momyer.)

Mr. Levit: I have added it on twice.

The Witness: It has been on twice, and it is already in there, and you will find it in there from the references, I believe.

Q. (By Mr. Levit): Now you recall the testimony that you gave on direct examination with respect to the item of stain and various other elements of depreciation, so-called, to the logs; you recall that, don't you? A. Yes, I do.

Q. Referring to that, you treated that in your claim, did you not, [60] as an abnormal loss due to the conditions that existed after the fire?

A. That's right. Depreciation, in other words. It was a part of our depreciation claimed, part of it was, and the rest of it was cost of partial operation.

Q. Well, you speak of it as depreciation. Of course, depreciation is one of the items of continuing charges and fixed charges and continuing expenses that is basically insured by the policy, is it not? A. That is correct.

Q. And in calculating your claim, so far as those fixed charges and continuing expenses was concerned, you did not actually include any depreciation on these logs at all, did you?

A. We did not include any?

Q. No, I mean in calculating the figure of depreciation or the figure of fixed charges on the annual basis, you did not include any of this item of so-called log depreciation?



(Testimony of Frank Momyer.)

A. I can't say that I knew what depreciation was going to continue following any fire, because I don't know what was going to burn, and I wouldn't know what to put in, but I put in an amount for depreciation of whatever nature that might be the subject of a claim following the fire.

The Court: I don't follow that question. Read it.

Mr. Levit: Well, your Honor, I think it may clarify it for the witness—I may be confusing him, and I don't want [61] to do that. Let me make a brief statement, to this extent. They start out by calculating the profits that would have been normally earned and prevented in the year following the fire. Then they calculate the fixed charges and expenses, continuing expenses, that would normally have been earned, that would have been necessarily incurred and normally earned in the year following the fire. The total of those two items gives their insurable values. Then they bring that down to a nine months' basis by deducting the three months. Now my point is that in making that calculation, they did not include—and properly so; I am not contending it was in error—any amount whatever for this so-called log depreciation; that they took this log depreciation later as an abnormal loss applicable, and added it into the nine months' figures, but they did not include it in the base from which the original nine months' figures were calculated.

Q. (By Mr. Levit): Is that not correct, Mr. Momyer?      A. I believe that is correct.



(Testimony of Frank Momyer.)

Q. All right. Now stain is of no particular significance, is it, in connection with box lumber?

A. Box lumber?

Q. Yes.

A. You wouldn't be likely to channel any stain lumber to a box factory, because it doesn't usually occur in the lower grade of lumber. It occurs in your best lumber, your clear lumber [62] that may be next to the bark of the log, the outer part of the log, where there is your best lumber. And I wouldn't say that that kind of lumber would normally be sent through the box factory.

Q. Now, in other words, this problem of stain is a problem that applies mostly to the so-called "uppers" or the higher grades, isn't it?

A. I think that is generally true, because you get your higher grades usually from the outside of the log.

Q. And as a matter of fact, I think you have testified that under the conditions that existed at that time, it was much more profitable to Pickering to run lumber through the box factory than it was to manufacture it through the sawmill and then divert it for sale purposes, isn't that correct?

A. Up to a certain point. There was some grades of lumber that wouldn't be profitable to put through the box factory.

Q. Isn't it a fact that the only lumber you sold during this period at all was where you had certain commitments to sell it, or for some other reason, of

(Testimony of Frank Momyer.)

perhaps allocation by the government, you weren't permitted to run it through the box factory?

A. No, sir, that is not true, and the records will speak for themselves on that. As a matter of fact, we sold almost forty million feet in the tested year, thirty-seven, according to the statement that you had there awhile ago; whereas we only put through the box factory about sixteen million feet. [63]

Q. You don't recall your attorneys making the statement that it was the box factory operation that was profitable and that the only reason that lumber was sold during this period directly without going through the box factory was to fulfill commitments that had already been made?

Mr. Whittaker: I believe that was after the fire. That was after the fire, counsel. That was not before the fire.

Q. (By Mr. Levit): That was after the fire, certainly.

A. When we had inventory. We put as much lumber through the box factory for the benefit of the insurance companies as we could; we leaned over backward and put some higher grades there that normally might not have been put through the box factory, because we did want to keep the box factory going.

Q. Yes. I am talking about the period after the fire; I thought I made that clear, but I guess I didn't. Now these fir logs are more expensive to handle from a logging point of view; are they not,

(Testimony of Frank Momyer.)

because they being smaller than your other logs, why, it takes more of an operation to handle them, to get the same number of feet out of them, doesn't it?

A. They are smaller logs, generally, yes. But as pointed out yesterday, it is not possible in following a log through the operation there to develop any difference in the cost through the mill. In other words, when you bring it from the tree down on the railroad and put it through the sawmill, it is all in one package, and I have never been able to distinguish there [64] any difference in the cost. You might hit on some theories there that if there was any difference it might be more for fir, because, for instance, in loading the logs, we pick up one log at a time to load it on the railroad cars, and being a smaller log, you wouldn't load as much footage as you would in a larger log, and fir being normally a smaller log, you might say there was some difference, but maybe somewhere else there is an offset, so I still say that as far as going through the sawmill, clear through to the point where it is sold as lumber or further processed through the box factory, I have never been able to find any reason to say that there was a difference in the cost at that diversion point.

Q. I want to direct your attention, however, to the logging part of the process alone, eliminating any consideration of the sawmill and the handling through the sawmill. Is it not a fact that because

(Testimony of Frank Momyer.)

of the smaller size of the fir logs, the cost of logging fir footage produced for the sawmill, not through it but for it, is greater?

A. I can't make a statement that would definitely support that.

Q. But at any rate, you did not take into consideration in calculating your claim that it was greater, did you?

A. No, sir. We took it all at the same.

Mr. Whittaker: If the Court please, on this line of questioning I believe we have unnecessarily taken up the time. The question is with respect to this matter, not whether the [65] appraisers found a correct amount. The question is, did they discharge the submission on the one hand, or on the other hand, did they exceed the submission with respect to extra charges. The testimony before your Honor will show that as to the item of extra charge costs for logging, and as to the costs for decking and as to the \$36,000 for log depreciation, they made no computation or finding of amounts. One of the appraisers, Mr. Maloney, denied all the liability for all of those claims. Mr. Herrick took another view, and he says there were days of debate about the matter, and finally the matter was compromised by, as Mr. Maloney says, "We allowed \$25,000 for the sheet," meaning the sheet in the schedule that contained all those items, "without any computations."

Mr. Levit: You weren't quoting Mr. Maloney, were you?

(Testimony of Frank Momyer.)

Mr. Whittaker: Yes, I am quoting him here from the deposition. "We allowed \$25,000 for the sheet." Now I have to go one step further. With respect to depreciation on the logs, Mr. Herrick says, "This was not depreciation, but was deterioration—therefore not allowable by the policies."

Mr. Levit: He didn't say, "by the policies," counsel. I am sorry.

Mr. Whittaker: Well, I will take out "by the policies." Therefore not allowable.

Mr. Levit: He wasn't talking about the policies at all.

Mr. Whittaker: Well, if it is allowable, it is allowable [66] on the policies. So we say that what they did was to entertain jurisdiction on a question of law and misresolved it. Therefore, they exceeded the jurisdiction of the appraisers under the submission in that respect.

Then on the other side of the matter, they failed to discharge the submission by making findings of fact as to the amount of loss with respect to the extra large logging costs of \$42,000, the extra decking expenses of \$20,000-odd, and logging depreciation of \$36,000; which they just compromised without any computation at \$25,000.

Now Mr. Levit is seeking here by this line of questioning, it seems to me—and I have had this in mind for a long time now—to try the whole case, and not the issues that are constituted by the pleadings.



(Testimony of Frank Momyer.)

The Court: Well, it is my understanding that Mr. Levit is attempting to show that these various items were in dispute and that resolving them one way or another depended upon taking into account certain accounting principles and certain other facts, such as the handling—whether fir is heavier or lighter than pine and harder and costs more to handle and all that—and he is doing that with a view to showing that this decision was really a decision of fact, of an ultimate fact, to wit, what the profits were and what the expenses were. And that therefore it was within the province of the appraisers whether they were arbitrators or appraisers, to determine that that is a [67] fact, and they did so.

Now you claim as a matter of fact that they based their decisions not only on erroneous theories of accountancy, but also on erroneous theories of law, and that they didn't find the fact but determined questions of law.

Mr. Whittaker: Yes.

The Court: And that as appraisers, they were not entitled to do so and therefore the award should be set aside. But he is developing his theory of the case by these questions, and I think that he ought to be allowed to continue.

Mr. Whittaker: I certainly defer without further argument to the Court's ruling, but I want to make this observation in that regard, if I may, your Honor:



(Testimony of Frank Momyer.)

Mr. Levit is attempting to, as your Honor has put it, show that the appraisers over all determined a result as a matter of fact. Whereas my point is that to meet any such effort would require a trial by us of the whole case, whereas the issue here is now here. It is the four points made by the pleadings, as to whether or not the appraisers in doing what they did in those particular circumstances exceeded the submission or failed to discharge it.

The Court: I get your point.

Mr. Levit: Now may I say this, your Honor, with regard to what counsel has just said. It sounds very much as though counsel has not read his own pleadings, because while that is [68] one of the points he makes, basically he must stand on the fact that as to these four points, the appraisers made a mistake. I mean, he has got to stand on the idea that the award was inadequate as to these four items. If that isn't established, he hasn't proved any case at all. I don't care what the appraisers did, what door they went in or what road they traveled, if as a matter of fact on these four items which he claimed they erroneously decided, they came out with the right answer, or an answer within the right area. The Court is certainly not going to set this appraisal aside.

Mr. Whittaker: Now that would be right as respects those four points. But not on the overall case.

Mr. Levit: Correct. This has nothing to do with the overall case. This is one of your four points.

(Testimony of Frank Momyer.)

Mr. Whittaker: Well, then, I believe counsel are in agreement.

Mr. Levit: Certainly.

Mr. Whittaker: But I believe counsel in his interrogation of the witness has exceeded those issues made by the pleadings. Your Honor will readily appreciate that at our pre-trial hearing we definitely agreed that what we are going to try were issues of the first count.

The Court: That's right. You see, these questions that he is asking him now, under his theory, deal with the question of cost of lumber into that box factory, as I get it. [69]

Mr. Levit: Well, this particular point of log stain deals with the so-called claim for depreciation on the logs.

The Court: That is one of them.

Mr. Levit: It is one of the so-called compromise items.

Mr. Whittaker: Now he was asking him about the extra logging costs, and therefore attempting to show that it costs more money to log fir, which we had to do after the fire, and my point in that connection is, your Honor, that it isn't a matter that we should be here concerned about, because the appraisers didn't find any amount, and the error is that they failed to find any fact as to the amount of the extra logging costs, but compromised it.

Mr. Levit: Now, your Honor, it sounds like counsel wants the Court to decide this case purely

(Testimony of Frank Momyer.)

as a matter of law; that is what we tried to get the Court to do in the first place, unsuccessfully.

Mr. Whittaker: No, I am trying to keep my issues alive.

The Court: Well, we can continue this argument this afternoon. We will adjourn now and be back at a quarter of two, because I will leave this afternoon at three twenty-five today. That is why we met early this morning, so that I would give you the full time.

(Whereupon a recess was taken until two o'clock p.m. this date.) [70]

Afternoon Session, Thursday, June 9, 1949  
at 1:45 o'Clock.

FRANK MOMYER

recalled as a witness, previously sworn.

Cross-Examination

(Resumed)

By Mr. Levit:

Your Honor, I understand that assuming we do not finish this afternoon we will continue tomorrow morning?

The Court: Oh, yes.

Mr. Levit: I am not sure whether we were in the middle of an argument or not.

The Court: You were in the middle of an argument whether or not you should question the witness

(Testimony of Frank Momyer.)

about the cost of logging fir compared to the cost of logging pine.

Mr. Levit: My impression is, but I am not sure, but my impression is that the question had been substantially answered.

The Court: Yes, he said he did not say it made any difference so far as the claim was concerned. That was your answer, wasn't it?

A. I believe it was.

Q. (By Mr. Levit): As I understood you, Mr. Momyer, you agree, do you not, that so far as the cost of logging was concerned, the bigger the log the more footage you would get out of it for more or less the same expense? Is that true, generally speaking?

A. I wouldn't say that. I think what I have said before is that [71] one particular operation might be more expensive on one log than on another. In other words, sugar pine is heavier than fir. It is more dense and heavier than fir. Therefore, if you go into transportation costs, and we usually go into transportation costs by weights, so that it would cost a little more to haul it on the railroad than fir. My statement is, by analyzing the thing all the way I still can't find any reason to differentiate any cost of logclear through the mill to the point of diversion to the box factory or to the planing mill and shipping dock for sale as lumber.

Q. Then, the fact is, in preparing your claim, you did not take into consideration any differenti-

(Testimony of Frank Momyer.)

ation in cost due to the fact that you had, as you testified, moved over to the fir in the logging after the fire?

A. We did not because you will recall a part of that logging operation was bringing in logs that were already on the ground. In other words, slightly more than half of the operation was bringing in footage that was already on the ground and that would have been pine or whatever happened to be on the ground. Therefore, it was unnecessary to make any differentiation as far as I am concerned.

Q. It is a fact, is it not, that so far as rot is concerned, it occurs in fir frequently before the fir is cut at all, doesn't it?

A. If it does, it normally isn't cut. You select the trees you [72] want to cut before you actually cut, you have a man called a bullback who goes around and marks trees to be cut and he tries not to get defective trees.

Q. He tries not to, but it is a fact that rot is known to occur in fir that is cut for use in mill operations before the trees are cut?

A. And also any other species.

Q. But it is particularly true of fir, is it not?

A. I wouldn't say that there is any more rot in fir than there is in the pine. There are a lot of pines that have rot in them.

Q. These estimates that were made by Mr. Moffatt and by Mr. Thomas were an attempt on their



(Testimony of Frank Momyer.)

part, I believe, to estimate not only the extent of so-called deterioration or depreciation in these logs, by your check tally, but also to actually allocate by months or by a period of time the time when this particular depreciation or deterioration occurred, is that not so?      A. That is correct.

Q. So that it was obviously and of necessity an estimate, wasn't it?

A. It would have to be an estimate, certainly.

Q. Considering the state of the market at the time that we are talking about in 1945, isn't it true that at that time the demand for lumber was such that there was very little degrading on account of stain or conditions of that kind? [73]

A. I would say there was a good demand for lumber, but as far as degrading, Mr. Levit, that wouldn't take care of it. If you sort those logs you could see the rot——

Q. Let us forget the rot for the moment and talk about the stain. That was generally true considering the state of the market at that time that there was very little degrading on account of stain?

A. You will recall, I believe, from reading Mr. Moffatt's report, that practically all of the lumber that was stained was finally rotted, because he made his test to show what it would have been if the lumber had been stained only, and no consideration given to the rot; but as a matter of fact, the stained lumber was almost all rotted.

Q. You are not attempting to say this claim



(Testimony of Frank Momyer.)

was all rot and there was not any substantial part of it that was stained?

A. I am only quoting from what Mr. Moffatt said he did there. He made the test that there was some lumber that was stained and was not rotten entirely, but most of it was rotten and the way you got a differential on the stained lumber, that in order to trim it to get the best boards out of it, quite often it dropped a grade lower and you got less price for it, and if it had been normal and you had a higher grade out of it.

Q. Of course, what happened where degrading was necessary, that instead of getting a higher percentage of uppers or the top grade out of a log, you got a greater percentage of the lower [74] grade, didn't you? A. Correct.

Q. That, however, was no particular disadvantage, was it? Because the truth of the matter was that Pickering made more money by putting the lumber through the box factory than by selling it as high grade lumber.

A. It did, but this particular lumber was not put through the box factory because it was not sawn until the sawmill was in operation, which was outside the insured period and most of it was sold.

Q. Of course, it is true, isn't it, that the insurance companies in the makeup of your claim were in no way concerned with what happened to that lumber. You were claiming a depreciation within the insured period, were you not?

(Testimony of Frank Momyer.)

A. Yes.

Q. What I am asking you is, to the extent there was a degrading as a result of that depreciation, it wouldn't have necessarily cost any money to Pickering because of the fact that you could still use it for box lumber in the lower grades, anyway, and you made more profit than by selling it as uppers, wouldn't you?

A. It depended on how high up you go, Mr. Levit. Taking all grades sold as lumber there was a greater realization per thousand on the lumber that went to the box factory.

Q. By the way, are you familiar, and I suppose you have read and [75] are familiar with the brief that was filed with the appraisers by the Pickering Lumber Company?

A. I have read that. It has been quite a long time ago. I haven't read it recently.

Q. This brief, I assume, was prepared by the attorneys, was it? A. I believe it was.

Q. So far as the factual statements in it go, however, it is a fact that you were consulted with relation to the makeup of this brief?

A. I think in some cases where there were figures needed that I was consulted, but not on all the statements made in there.

Q. I will ask you if you were consulted on the statement which is on page 43 about two-thirds of the way down:

“Pickering made a bigger profit on the lumber

(Testimony of Frank Momyer.)

that went through the box factory than it did on the lumber that was sold directly from the sawmill or planing mill."

A. As a whole, yes, but on certain of the higher grades of lumber we made more and we didn't put that through the box factory under any circumstances.

Q. If that was not generally true and not specifically true, will you explain, please, the statement that is made in the answer which Pickering filed here on pages 17 and 18 to the effect that:

"During the entire nine-months period following the fire, lumber to be used for the manufacture of box shook [76] was of greater value to defendant than lumber to be sold after it had passed through the saw mill and the planing mill, because under O.P.A. ceiling prices a greater profit could be made upon the lumber manufactured into box shook. In the transaction of its regular business, defendant did not sell any of its lumber suitable for the manufacture of box shook and never at any time contracted with any of the plaintiffs to do so, and so forth."

That is a correct statement, is it not?

A. "Suitable for the manufacture of box shook," you notice it says; that doesn't mean all the upper grades of lumber.

Q. But if the upper grades of lumber as a result of that degrading process caused by the stain that you have spoken about, if the upper grades

(Testimony of Frank Momyer.)

of lumber had to be degraded, then it would be lumber suitable for box shook.

A. It depended on how far down it went. If it just dropped one grade, then it would still be salable as lumber on the market.

Q. It is a fact, is it not, Mr. Momyer, that the figure which you carry into your proof of loss as to which you have testified that relates to the so-called excess logging costs that were incurred after the fire is an estimated figure, isn't it?

A. I wonder what you mean by "estimated"?

Q. I mean to say it merely represents the best judgment of the Pickering Lumber Company as to what it was proper to set up this so-called excessive logging cost at that it represents an [77] opinion, in other words, and not a fact.

A. It is a comparison of the cost of logs brought in prior to the fire and a comparison of the cost of bringing in logs after the fire, the difference between the two being the excess cost that we have planned.

Q. What is that difference per thousand?

A. \$3.60.

Q. I ask you again, Mr. Momyer, if it is the fact that that figure of \$3.60 is merely an opinion and does not represent any fact at all.

A. No, I cannot say, because as previously stated, we had the high cost of logging at a time when we normally have a lower than average cost of logging at that time of the season. At the start of

(Testimony of Frank Momyer.)

the season when you are getting ready, getting the roads and everything ready, costs are normally higher, and therefore July to August 7 was a high cost period and it can be supported as a high cost period from previous records, and the period of July and August and possibly September when maximum volume is reached, is a low period of operation because you are bringing in greater volume. We arrived at this conclusion that if the cost following the fire were higher when normally they should have been lower, then certainly we could have been justified in claiming the difference between that higher cost and the cost prior to the fire, admitting that that was even a higher cost than would probably be there, but it [78] certainly was a reasonable basis, and that is the basis on which we computed this.

Q. Mr. Momyer, granting that it was a fact beyond dispute that the Pickering Lumber Company had to spend more to log per thousand feet or per foot, after the fire than before than its normal cost, what I am asking you is something different; I am asking you if it is not a fact that the figure which you used of \$3.60 per thousand feet to represent that cost was purely your own estimate and your own judgment?

A. It was certainly our own judgment on the basis of the facts that we knew about.

Q. You will not concede, then, that any factor of opinion or estimate or judgment enters into



(Testimony of Frank Momyer.)

that \$3.60 figure, but it is merely a matter of mathematical calculation; is that what you intend to tell the Court?

A. I have told the Court how we calculated it, and whether that is an estimate or rate is something else I cannot say. I have shown you how we calculated it and the basis we used and I don't know what further answer I can make.

The Court: What counsel wants to find out from you is, was there in that calculation any factor that had to be, or any element that had to be just an estimate or a matter of judgment rather than a matter of arithmetic computation?

A. In both costs, your Honor, there is this depreciation I mentioned this morning that has always to be an estimate because [79] you can't determine that. Factually there are differences of opinion as to how much depreciation occurs.

The Court: But he is speaking of the excess logging cost.

A. The excess logging cost both factors were used, the \$21.91 and \$25.51, and there is an item for depreciation and that, of course, is an estimate. I don't think of any others at the moment but there are probably other items in there that are handled in the same manner as depreciation.

Q. (By Mr. Levit): I am going to ask you whether or not you agree with the statement made by Mr. Herrick in Plaintiff's Exhibit B to this effect, and I quote:



(Testimony of Frank Momyer.)

“The excessive logging cost which had been claimed of \$42,797 was palpably excessive. It was undeniable that the logging cost during the loss period would naturally be greater than during the preceding year due to the continued increase in any of labor and cost of material of the amount of increase applicable to the reduced production which would be reasonable of allowance but only be determined by guess. There had been no adequate evidence with respect to this,” and so on.

Do you agree with that statement, or do you disagree with it?

A. I disagree to the extent that we presented the best evidence that we knew how.

Q. Mr. Momyer, isn't it a fact that you yourself admitted to the [80] appraisers at the formal hearings that were held by them that the question of whether this \$3.60 rate was excessive, was an open question?

A. I haven't denied that here. I said that was the best estimate we knew about. Mr. Herrick questioned it and I have said he has a right to his opinion, but we presented the best evidence we knew how to present and that is all I can say on it.

Q. Then, it was true as is stated in Mr. Herrick's notes of the hearing, which is Plaintiff's Exhibit T, and I am reading from page 132 of the transcript of Mr. Herrick's deposition:

“Upon question by Herrick as to why the rate of \$21.91 and \$25.51 had been used to develop the

(Testimony of Frank Momyer.)

excess average cost after June 30 of \$3.60 while the average for the entire operation of \$23.45 (page 24) had been used in Schedule R-6, he conceded that the question of whether the \$3.60 rate was excessive was an open one."

Is that a correct statement?

A. I haven't meant to deny that. Mr. Herrick is entitled to his opinion and I am entitled to mine, I suppose, and I still say that we presented the best evidence that we knew how taken from something that was concrete, at least; it was not a guess.

Q. Bearing in mind, then, your testimony before the appraisers and trying to continue to paragraph 14 of the second amended answer filed by the Pickering Lumber Company in this action and I am going to read that paragraph: [81]

"One of the effects of the fire was to cripple and reduce the efficiency of defendant's plant. As a result thereof it is more expensive for defendant to continue partial operation after the fire. The figures taken from the defendant's books and presented to the appraisers showed that additional expense for logging amounted to more than \$42,000."

That is the figure, is it not, Mr. Momyer, that was arrived at by the use of this \$3.60 rate?

A. That plus the stain and in-check rot and so forth of \$4075.40 which is the figure developed from \$3.60.

(Testimony of Frank Momyer.)

Q. I read on from the answer:

“Said expenses”—that is the excess logging expenses—“were not estimated, but were actually incurred. The actual amount thereof was credit entered upon defendant’s books,” and so on.

Now, I ask you, Mr. Momyer, if it is not a fact that that statement in the answer to this effect of excess logging cost shown in the claim is not as stated in the answer and actual cost actually incurred and entered upon your books, but was merely your best estimate as to which you admitted to the appraisers the question of its excessiveness was an open one?

A. It may be an open one as to whether we used the right factor principle in arriving at that figure.

Q. And now, in connection with this logging after the fire, when [82] was it that Pickering Lumber Company with relationship to the fire determined it was going to continue logging?

A. Within a few days after the fire we resumed operations of bringing in the logs that were already down on the ground at the time of the fire, within less than a week—I would say three or four days.

Q. Very shortly after the fire?

A. That’s right.

Q. That is when the decision was made?

A. But the decision to cut further logs, because we had to bring in the logs that were on the ground, there was nothing else to do—the decision to log

(Testimony of Frank Momyer.)

the fir was made some time between then and the time that we actually started in the fir area, which was around the end of July, around July 27 to 30, as I remember; but we did not stop logging at any time after the three or four days that we shut down, pending what we were going to do there.

Q. I believe you testified you actually started felling additional logs after the fire, by July 27; that is, within 20 days after the fire?

A. Yes, we started felling the fir logs at that time. The others were already on the ground.

Q. Now, let me ask you whether or not it is true that in the next winter after this occurred, that the reason that the logs that the Pickering Lumber Company had on hand as a result of [83] this logging after the fire and the fact that the sawmill was not operating, and so on, that you were able to run the sawmill right through the winter when you would normally have been shut down?

A. Not for that reason.

Mr. Whittaker: Pardon me, I believe you are talking about two different years, are you not, Mr. Levit? You do not mean the winter following the fire, do you?

Mr. Levit: No, it was the year following that because the sawmill didn't start up again until after January, did it?

Mr. Whittaker: One side of it, the small side of it, finally, on August 1, 1946; but we didn't get the big side constructed until, I think, March, 1947.

(Testimony of Frank Momyer.)

Mr. Levit: I am glad you correct me, counsel. What I am getting at is this, that it is true, is it not, Mr. Momyer, that at a date after these logs were brought in you had built up, because your sawmill was shut down, a stock of logs which enabled you at some future date to run your sawmill during a period when it would normally have been shut down; is that not correct?

A. No, it is not.

Q. It is not correct? What did you do with the logs, sell them?

A. For this reason, we not only start our logging operations around April 15 to May 1 and in the year following the fire in 1946 we couldn't start our logging operation until late in July. [84] Therefore, if we could have put those logs back up in the trees we would have been much better off to have had them off, and went out April 15 and May 1 and logged until August 1 and had fresh logs to operate with—we could have logged considerably more than the 15,000,000 we had on hand at the time.

Q. Why didn't you start the logging on May 1? Was there anything to prevent you from doing that?

A. We didn't want any further loss on depreciation.

Q. But the depreciation was only a percentage of the actual value in the logs, was it not, and you charged the depreciation to the insurance companies as part of your claim?

A. Depreciation for nine months only; we had



(Testimony of Frank Momyer.)

considerable depreciation we couldn't charge to the insurance companies in the loss period.

Q. As a matter of fact you knew, didn't you, when you started to do this logging work that even if the sawmill was not put back into operation within the nine-months' period that you would still be able to use these logs that you brought in, these extra logs that you brought in during that nine months' period for which you charged the depreciation against the insurance companies when, as and if you got your sawmill into operation at some future time; you knew that, didn't you?

A. We knew we would have to use them somewhere along the line.

Q. Why, certainly.

A. But we could have used the fresh logs to much better advantage [85] if we knew what we know now; we certainly wouldn't have cut any more than were cut.

Q. Isn't it a fact, Mr. Momyer, that when this fire occurred and for a period after the fire, for some time after the fire, the Pickering Lumber Company took the position informally that the contract logging operation in its entirety was not within the contemplation of these policies?

A. Absolutely not; the insurance companies took that position and later receded from the position which we did not ever take.

Q. Your statement is that the Pickering Lumber Company did not get the value of these logs by rea-

(Testimony of Frank Momyer.)

son of having an extra supply of logs on hand so you could run your sawmill in a period when it normally would be shut down?

Mr. Whittaker: I object to that question and to the use of the word "value."

The Court: Perhaps "benefit" would be a better word.

Mr. Whittaker: "Benefit" would cover it.

The Witness: We certainly did not, for the reasons explained before.

Q. (By Mr. Levit): I understood you to say that you started this logging operation solely for the purpose of the insurance company and that you stopped it as soon as it was determined that you could not put the money into operation within the nine months' period, is that right?

A. I say that we had cut the approximately 6,000,000 feet, but [86] we had decided to get it about the same time that we received word from Filer and Stowell that they had a strike in their plant and the building of our machinery was interrupted.

The Court: That was October 8?

The Witness: That was October 8.

Q. (By Mr. Levit): Now, you did not present to the appraisers, and I mean Pickering did not present to the appraisers, did they, any figures on the allocated cost of lumber going into the box factory, that is, the allocated cost out of the sawmill?

A. We did not.

(Testimony of Frank Momyer.)

Q. Yes, the fact of the matter is that the average price that you used was the price that is the average costing of the lumber, the figure you used as average cost at which you costed the lumber into the box factory operation was a figure that was based on the Pickering operations for the year ending March 31, 1945, wasn't it?

A. You asked a pretty long question there.

Mr. Levit: I will withdraw it. It may have been confusing.

Q. You costed the lumber into the box factory operation making your calculation of the claim at a price of around \$38 or \$39?

Mr. Whittaker: \$39.86.

The Witness: \$39.87.

Mr. Levit: \$39.87?

Mr. Whittaker: \$39.86.

Q. (By Mr. Levit): And you arrived at that figure on the [87] basis of your operations for the fiscal year ending March 31, 1945, didn't you?

A. No, I did not. That was the operations from April, 1946, until the time of the fire because that lumber was considered to have been processed in that season with the exception of a small portion that might have been carried over.

The Court: You don't mean over to April, 1946?

A. I mean April, 1945, to July, 1945, I am sorry—just preceding the fire.

Q. Referring you to the auditor's report, Robinson-Nowell's report which is in evidence, and

(Testimony of Frank Momyer.)

the Clerk does not have it at the moment, this average price figure, will you find me in that report a comparable average cost figure to the one that you used for that fiscal year?

A. Are you still now talking about the lumber that went to the box factory following the fire?

Q. That's right.

A. Well, I have just stated it is not in the report for March 31, 1945, because we used the production in the following fiscal year beginning April 1, 1945, to July 7, 1945.

Q. I understand that, but what I am asking you for is a comparable figure for the preceding fiscal year. If we turn to the cost of lumber to factory for the preceding fiscal year based on your so-called average cost basis, is it not this figure that I am calling your attention to, \$37.39? [88]

A. All the figures are on the proof of loss on page 3.

Q. Will you wait until I get the proof of loss?

A. It is a little bit less than that when they finally worked it through here, they have \$36.82 in that particular year. That is Schedule P2.

Q. Yes, I have it.

A. You will find at the bottom of the page that the report to the factory in that fiscal year was costed at \$36.82 and on page 23——

Q. Pardon me. Before we leave that, calling your attention to the Robinson-Nowell report for the fiscal year ended March, 1945, and calling your

(Testimony of Frank Momyer.)

attention to Schedule 6, the next to the last line on that page states, "Cost of lumber to factory," and the price is given as \$37.39, isn't it?

A. I think so, but they have reconciled anything that might have affected that in their report. These figures have all been taken from their report. They made them and there is a slight difference there at this point in the report.

Q. Yes, but that is substantially the figure that you used?      A. That's right.

Q. And actually when you got a figure to cost the lumber into the box factory on the basis of average cost, it came fairly close to that \$37.39? As a matter of fact, you said \$39.86 which is a little higher.

A. That's right, but you will find that \$39.86 figure on page 23 [89] of our proof of loss.

Q. Page 23?

A. Schedule R6, preceded by Roman Numeral III, you will find \$39.85652

Q. Yes, I see that. That is where you arrived at that figure, but it was arrived at in substantially the same way as this was in the Robinson-Nowell report.      A. That's correct.

Q. There is not any Robinson-Nowell report, nor did you furnish to the appraisers any basis for calculating allocated cost.

The Court: I think he already answered that.

The Witness: I answered that already.



(Testimony of Frank Momyer.)

Mr. Levit: I beg your pardon, he did answer that; that is correct, your Honor.

Q. (By Mr. Levit): There were some questions in your mind, were there not, in connection with your calculations as presented to the appraisers with reference to the figures you used on the profit obtained from the operation of the box factory after the fire?      A. Some question?

Q. Yes, there was some doubt in your mind as to some of the factors that entered into the calculation of that box factory profit?

A. I do not recall that at this moment.

Q. Oh, refreshing your recollection, I will read to you from Mr. [90] Herrick's notes, which is Plaintiff's Exhibit T regarding your testimony given on the appraisal, page 125 in the transcript.

"He—meaning yourself—"stated that the computation of the rate of profit developed by Schedule P-1 and based on the average realization developed by the 58,000,000 sold through the fiscal year ending March 31, 1945, and that in computing the average, the average realization of such quantity had been applied against the average cost of the production of that year of 53,000,000 feet. He stated that there had been some question as to whether the average total realization should have taken into consideration the lumber sold out of inventory or only the lumber sold out of production, but it had finally been determined that the total lumber sold including that out of inventory should be combined with

(Testimony of Frank Momyer.)

the realization to lumber from conversion into shook."

A. That does not touch on the box factory problem, as I see it, Mr. Levit.

Q. Well, it touches on the question of the realization, doesn't it, from the lumber?

A. Yes, we sold in the year preceding the fire, called the test year, that is, the fiscal year ending March 31, 1945, we sold 58,391,343 feet of lumber either direct as lumber or through the box factory, and we only processed in that year 53,607,934 feet. So the average of 6.68667 was applied to the total [91] production of 53,607,934, to obtain the total profits prevented on the basis of production that we believed would be prevented for the year following the fire.

Q. Now, with regard to these O.P.A. prices, it is a fact, is it not, that the realization for lumber sold, that is, lumber prices under O.P.A. rose between '42 and '45?      A. Rose?

Q. Let us put it this way, the O.P.A. ceiling prices on lumber processed by a mill such as yours in general and on box lumber in particular, rose between '42 and '45?

A. I think there were some adjustments in ceiling prices made during that period.

Q. Isn't it a fact that the price for box lumber went up from about \$40.74 to about \$45.12?

Mr. Whittaker: Still speaking of 1942?

Mr. Levit: Between '42 and '45.

(Testimony of Frank Momyer.)

A. The price for box factory lumber?

Q. Well, lumber realization generally under O.P.A.—I will withdraw the question and I will call your attention to this portion of Mr. Herick's notes of the hearing regarding the testimony of Mr. Lucas. Mr. Lucas was one of the accountants employed by Robinson-Nowell who were Pickering's accountants, was he not?

A. Correct.

Q. And you produced him as a witness at the hearing? [92]      A. Correct.

Q. (Reading) "Mr. Lucas presented a memorandum re shook realization to show that while lumber realization increased slightly from 1942 to 1945, the realization through conversion into shook increased greatly. This"—and I presume it refers to this statement that Mr Lucas presented, on memorandum—"showed realization for 1942 of \$40.74 for lumber sold as such and \$27.76 for lumber converted into shook, whereas in 1945 lumber realization was \$45.12 while shook conversion produced \$51.90."

Do you recall that testimony?      A. I do.

Q. And that accords, does it not, with your own knowledge of the conditions during that period?

A. To my general knowledge, and I can check the two figures, \$45.12 and \$51.90, that he quotes. I do not have before me and cannot check them.

Q. That is summarized by lumber on the one

(Testimony of Frank Momyer.)

hand and by shook on the other, and the lumber prices increased from \$40.74 to \$45.12 in those three years while the shook prices increased from \$27.76 to \$51.90 in the same three years; that is substantially a correct statement?

A. I think that's right, and as has been pointed out before the O.P.A. prices probably were set low on lumber suitable for the [93] box factory so that operators would not be encouraged to sell any such lumber on the market, but through the box factory, and make box shook because it was badly needed in the war.

Q. Do you recall that there was any reduction in the period from 1942 when O.P.A. went in, to 1945, any reduction in the price of lumber or box lumber, or any kind of lumber under the O.P.A. ceilings?

A. Any reduction?

Q. Yes. A. I don't recall any reduction.

Q. Reduction—reduction.

A. I don't recall any reduction, but in some cases a higher raise was applied to some grades or species than others.

Q. That's right." In other words over that three year period from the time O.P.A. went in until after the fire the price on lumber went up; it didn't go down.

A. It was generally going up.

Q. Yes, it was generally going up.

A. But this difference that I'm talking about could be created by raising certain grades of lum-

(Testimony of Frank Momyer.)

ber high and leave the others stand almost where they were, or not raising them so much.

Q. At the time that the O.P.A. fixed its prices on lumber, the policy of the government was to encourage the production of lumber as opposed to shook, was it not, because it needed that lumber for building cantonments and so forth? [94]

A. I think it was that they wanted the lumber worse, perhaps, than they did the box shook, because they were not shipping supplies abroad yet to any great extent.

Q. In other words, they were at that time trying to encourage the production of lumber as such and sale of the product as lumber rather than its diversion to remanufacturing process such as the box factory, weren't they?

A. I think they were doing that.

Q. It is a fact, is it not, Mr. Momyer, that when the original O.P.A. ceiling prices were fixed they were fixed on the basis of actual market at the time and they took into consideration actually when they were fixed, the industry-wide cost of production of the various grades and a reasonable profit thereon.

Mr. Whittaker: I object to the question as calling for the elements and factors that enter into the minds of the legislators in the legislative process; it calls for the conclusion of the witness, something he could not possibly know.

The Court: I think it does call for his conclusion.



(Testimony of Frank Momyer.)

Mr. Levit: I think the witness certainly must know at the time the O.P.A. prices were fixed on lumber in 1942 that they were fixed at a liberal level which permitted the manufacture of the lumber of the various grades including box lumber at the sale under the ceiling at a reasonable profit which, of course, this is an offer to prove——

The Court: Do you know that of your own knowledge? [95]

A. I did not, your Honor.

The Court: Did you have anything to do with the fixing, or did you sit in on any of the hearings, or were you or your firm consulted on the fixing of prices by the O.P.A.?

A. I do not believe we were, your Honor.

Q. (By Mr. Levit): In other words, you were not aware that was the fact or not; but, you do know at that time the policy of the government was to encourage the production of lumber and sale of lumber as such?

A. My information is that they had probably two reasons for doing this.

Mr. Whittaker: This calls for his conclusion.

The Court: I think it is hearsay.

Mr. Levit: I will withdraw the question.

Q. Now, Mr. Momyer, it was later, then, was it not, that the government decided to encourage the production of box shook, that is, the remanufacture process that took place, at the box factory, because of the fact that as I believe is alleged at

(Testimony of Frank Momyer.)

great length in the Pickering answer, that the shook was needed for shipment overseas, and that was after the O.P.A. prices were fixed, wasn't it?

A. I am sure it was.

Q. In order to accomplish that result the government raised the ceiling on box shook, did it not?

A. Yes, sir. [96]

Q. And it raised it to the approximate level as compared with the 1942 as we have seen; that is correct, isn't it?

A. I know it was raised. I don't know the exact levels except the figures that I identified here a while ago.

Q. Well, those are the figures used, and it accomplished that purpose, then, in that way and not—and you can correct me if I am wrong—and not by any reduction in the ceiling prices on box lumber; that is correct also, is it not? [96A]

A. I don't recall any reductions being made in box factory lumber, but as stated before, the differential could be created by raising other grades of lumber and leaving box factory lumber stand substantially as it was before any raise was considered.

Q. All right. Now it is a fact also, isn't it, Mr. Momyer, that a calculation, a determination of an allocated cost for the box lumber produced by Pickering in the fiscal year ended March 31, 1945, would be substantially less than the OPA price on box lumber, would it not?

(Testimony of Frank Momyer.)

A. Not on the method that I think would have to be used.

Q. Well, the method that you think would have to be used is an average cost method, isn't it?

A. Well, even if I subscribed to the allocated cost theory, which I do not, the common theory used there is that in relation to the selling price of the products, the cost is allocated; so on this page 3, schedule P-1, you will note that the average selling price of all lumber sold as lumber was \$46.28, whereas the fact realization for that same lumber was \$51.90. Therefore, on that theory, you would allocate a higher cost to the box factory lumber than you would to the lumber sold as lumber.

Q. Well, I think we understand each other all right, but we seem to be talking to cross purposes. I am talking about lumber on the green chain. In other words, I am talking about an [97] allocated cost of box lumber on the green chain as it comes out of the factory, based upon the OPA ceiling price, the in-place-value price.

A. But the theory of allocated costs is based on sales prices.

Q. You mean your theory of allocated costs?

A. We made no sale to the box factory. We merely processed that lumber farther through the box factory, as explained this morning and cut up small boards out of large boards and loaded them on the cars instead of the big boards. We didn't

(Testimony of Frank Momyer.)

make a sale until we put that shook in the car and sold it.

Q. Now you are aware of the fact, aren't you, Mr. Momyer, that Mr. Herrick in Exhibit S, which was a letter written by him at the request of Judge Barnett to Judge Barnett with relation to the position of Pickering as to the result of the appraisal—you are aware of the fact that Mr. Herrick stated in that letter, and I refer to page 113 of the transcript, line 9, "the danger of the foregoing argument—"; that is the argument that Judge Barnett had suggested—"is the fact that profit is not construed to be realized until sale takes place, and that consequently the production of each of the departments prior to final department should be valued at cost, which in this case would not be the average cost, for which you argue, but allocated cost. And upon such basis, the lumber used by the box factory and post-fire operations would be computed as costing at least several dollars less than the OPA prices, [98] which were adopted."

Did you disagree with that statement in regard to the relationship between a proper allocated cost and the OPA prices?

A. Yes, but would you read the statement that he made there again about the sale, that the sale was to be made——?

Mr. Whittaker: And to straighten the record, that is the letter, is it not, Mr. Levit, written

(Testimony of Frank Momyer.)

by Mr. Herrick to Judge Barnett after the appraisers' findings had been filed?

Mr. Levit: That is correct.

Now if the Court please, I think that this might be as good a time as any to read this letter to your Honor. Do you wish to take a recess?

The Court: Well, there is a long distance call coming for me. We will go ahead, but if I get up precipitously, you will understand.

Mr. Levit: I am nearing the end of my cross-examination, your Honor.

This is a letter on the letterhead of Lester, Herrick & Herrick, certified public accountants, dated March 1, 1948, addressed to Judge Paul V. Barnett, San Francisco, California: (Reading.)

"My dear Judge Barnett:—"

Judge Barnett, it will be stipulated, I am sure, was then acting as attorney for Pickering. [99]

The Court: Yes, I know.

Mr. Levit: (Reading.)

"In re Pickering Lumber Company, business interruption insurance claim.

In writing this letter I do not mean to infer any modification of my approval of the findings of the appraisers in the above-entitled matter. As I have explained to you orally, in a situation such as this there is no specific amount which can be asserted to be the correct valuation, and that all others are wrong, but rather that there is an area within



(Testimony of Frank Momyer.)

which any amount is appropriate of designation as a fair valuation.

The valuation found by the appraisers was in my opinion within that area. However, as the corporation has chosen to contest the findings, it is appropriate for me to give you such information and views as might be helpful in obtaining its objectives.

One of your basic contentions, as I understand it, is that the appraisers erred in using a market price for the lumber converted by the box factory after the fire. It is your contra contention that the charge into the box factory should have been at the average cost. I believe your [100] contention that the profit of the box factory after the fire should be based upon the average cost of all lumber produced is erroneous, without any foundation in accounting, and can be successful only by the application of some principle or claimed principle of law which will be wholly unrealistic and in disregard of accounting principles.

Lumber is a finished product in all of its several grades. All of the several grades come out of logs, which in general have an average cost, and it is perfectly true that from the standpoint of milling expense there is no difference between the cost of sawing a piece of lumber of low grade and pieces of lumber of high grade. It is also true that in determining the profit of a sawmill operation, there is no requirement for any segre-

(Testimony of Frank Momyer.)

gation of costs as between grades, because all of the costs are applied against all of the proceeds, unless there is appreciable variation in the grade percentages in the beginning and ending inventories.

It should be obvious that an accurate profit and loss statement would not result if the beginning inventory had nothing but clears in it and the ending inventory had nothing but commons or vice versa; because of this the practice of cost allocation is [101] well recognized in accounting. Under this method production cost is allocated between grades in the ratio of their value. This method has a sound basis in the principle that each piece of lumber produced should contribute to the cost of its production in ratio proportionate to its realizable value. Lumber, regardless of grade, constitutes a finished product, and its reworking into doors or pipe or box shook becomes a supplemental operation, and it is fundamental that to determine the profit from each supplemental operation, the lumber consumed should be charged in at a price equal to that which could have been realized had the supplemental operation not taken place. This is a general practice among lumber and box manufacturers.

The Pickering Lumber Corporation determined box factory profit upon that basis, and I doubt that you could get any accountant to testify to the effect that that was not the generally accepted basis. It

(Testimony of Frank Momyer.)

was no surprise to me to be told by the other appraiser that he had consulted three or more accountants connected with lumber operations, who informed him that such was the correct basis. Under ordinary circumstances I do not believe that there could be any basis for arguing for any other method of determining the box factory [102] profit. In this case, however, the situation produced by the war and OPA prices opens the door, I think, to the contention that other methods should be followed.

At the time of the fire the company had a certain stock of lumber which it could make into boxes. Because the company had a box factory and because of the market price for shooks, it gave this lumber in its situs a peculiar value, much greater than the OPA price. Had the company been able to purchase lumber, it would willingly have paid \$40 or more per thousand, and had it not been for the OPA prices, it could have sold the lumber for \$40 or more per thousand. Accordingly, it may be argued that because of its locality and because the company had a box factory, the lumber had a value which should be recognized without regard to the artificial OPA prices. Frankly, I believe this argument pretty weak, but I give it to you for what it is worth.

Another argument which may be made carries out the argument which you have used, that in the case of Pickering Lumber Corporation, there was

(Testimony of Frank Momyer.)

what is termed an integrated operation, and that the lumber which was intended to be used [103] for the production of the box shook should not be considered a finished product. On such a basis the problem then becomes one of assigning to the various operations their contribution to the ultimate profit. In other words, while it is true from a legal standpoint that profit is not realized until the sale is consummated, it is unrealistic, viewing the three operations of logging, milling, and box factory, as merely parts of one total operation, to contend that all of the profit from the sale of box shook belongs solely to the box factory. In fact, were it not for the fact that lumber is a finished product, the recognition of this principle of the contribution of each department to the total profit is necessary of recognition in many use and occupancy settlements. For the purpose of testing this theory, I did make some preliminary computations, the result of which developed the loss as somewhat larger than that ultimately found. But because that computation was made before a number of other determinations, which would bear upon it, it would be necessary for me to completely recompute it if you were to care to use it. The danger—" and this is where I started reading when I asked the question—"the danger of the foregoing argument is the fact [104] that profit is not construed to be realized until sale takes place, and that consequently the production of each of the

(Testimony of Frank Momyer.)

departments prior to the final department should be valued at cost, which in this case would not be average cost, for which you argue, but allocated cost; and upon such basis the lumber used by the box factory in post-fire operations would be computed as costing at least several dollars less than the OPA prices, which were adopted. However, it is the general principle of U and O insurance that profits insured are the profits of production and not of sale. If it were not for this, the profit made by the sale of the lumber as lumber after the fire would have been considered as a loss recovery. Also, in Mr. Wither's testimony, he stated that in any use and occupancy policy covering an entire operation, it must be recognized that each unit was insured only to the extent it contributed to the whole profit. While Mr. Wither made this statement in connection with the allocation of overhead, the principle would apply also to the factor of profit. I know that the stain loss is very much in your mind. I would like very much to give you suggestions which might occur——"

The Court: Will you excuse me for a moment?

(Brief recess.) [105]

Mr. Levit: Your Honor, I believe I was just finishing reading the letter.

The Court: Yes.

Mr. Levit: I was on the last paragraph: (Reading.) "I know that the stain loss is very



(Testimony of Frank Momyer.)

much in your mind. I would like very much to give you suggestions which might support you on this question, but none occur to me.

Faithfully yours,

/s/ ANSON HERRICK."

The Court: That was written after the report was made?

Mr. Levit: That was written March 1, 1948.

Q. Now, Mr. Momyer, I will ask you again if that is not true, as Mr. Herrick states, that upon the basis of an allocated cost of the lumber that went to the box factory, that that allocated cost would have been at least several dollars less than the OPA prices which the appraisers adopted, namely, \$31.55?

Mr. Whittaker: Just a moment, I object to the question because counsel has not stated at what place he desires to indulge a sale—whether a fictional sale on the green chain or the actual sale of the shook.

Mr. Levit: I am not indulging any sale at all, counsel, I am simply trying to establish the fact as stated by Mr. Herrick, that an allocated cost to box lumber on the green chain [106] would be several dollars less.

The Court: That is it, on the green chain?

Mr. Levit: On the green chain. There is no sale question involved here at all.

The Court: Using OPA prices as a basis?

Mr. Levit: That is right.

(Testimony of Frank Momyer.)

Mr. Whittaker: That clears it up.

Q. (By Mr. Levit): Is that not correct, Mr. Momyer?

A. On the basis of forcing a sale there. We don't sell box factory lumber.

Q. That is correct, but on the basis of the sale——

The Court: What he means is that taking OPA prices for the box factory lumber on the green chain——

The Witness: If you do that, yes, your Honor.

The Court: If you take it on that basis, take the allocated cost, that would be less than the OPA price?

The Witness: If you take it at that point, it would be, yes, sir.

Q. (By Mr. Levit): As a matter of fact, it would be around \$25 or \$26, wouldn't it?

A. I have made no computation at all on it.

Q. Does that sound unreasonable to you?

A. I think it is a little lower than it actually would be. I don't know how much it would be.

Q. But it would be at least several dollars under the OPA price? [107]

A. That is what Mr. Herrick says, and I presume he made some computation. I have made none.

Q. With respect to the books of the Pickering Lumber Company, there were certain matters put before the appraisers, some of which we have al-

(Testimony of Frank Momyer.)

ready touched on, that indicated that the books were in some respects at least either in error or based upon matters that were matters of judgment and opinion rather than matters of fact. That is correct, is it not?

A. I don't know what you have in mind.

Q. Well specifically, I will call your attention to the fact that at the hearing I am sure you recall that you yourself testified that in respect to a number of items shown in the proofs of loss, the books have been in error or the claim was error or something was in error to the tune of maybe a thousand dollars or something of that kind. Do you remember that?

A. Yes, we called attention to the fact that in our proof of loss, after it was prepared and printed, we found that we had—I believe it was around \$800 or \$900 that should not have been in there, representing telephone calls that were made in connection with the sale of some property or in connection with some outside property, and should not properly have been included. And we called the appraisers' attention to that and asked them to take that out.

Q. And that was one of them, wasn't it? That was item, wasn't it? Now in addition to that, we have already noticed that you [108] stated to the appraisers with reference to the computation of realization figures, that there was some question as to whether that should be calculated in one way or

(Testimony of Frank Momyer.)

the other, but that you had decided to do it a certain way. Do you recall that?

A. Are you referring again to this fifty-eight million three hundred ninety-one thousand three hundred forty-three feet that was sold?

Q. That's right. A. In the year before.

Q. That's right.

A. Yes, I explained that, I believe, before.

Q. Now in calculating your excess logging costs, Mr. Momyer, it is a fact, isn't it, that you told the appraisers that the statement of overhead applicable to logging which you had used was—and I quote you—"pulled out of the air," and that there was no scientific basis for it. Do you recall that?

A. I said that we did not in our normal accounting procedures attempt to allocate overhead to any part of our operation, and that it was therefore something we had to do that we had not been doing, and we had to estimate some percentage or some basis of doing that. It was a new field for us.

Q. On what page will you find schedule R-1, can you tell me that? A. Schedule R-1?

Q. Yes. A. It will be found on page 21.

Q. Thank you very much. That is the schedule that deals with your logging computations, isn't it?

A. That deals with the overhead credit of sixty thousand one twenty-five nineteen.

Mr. Whittaker: Dollars?

The Witness: Yes, \$60,125.19, that we gave back

(Testimony of Frank Momyer.)

to the insurance companies as a recovery from this partial operation.

Q. (By Mr. Levit): Well, of course, the recovery was based upon your logging operation, the whole calculation was a calculation of your logging operation, and the appropriate amount to be credited back, wasn't it? A. That's correct.

Q. Yes. Now I call your attention to Mr. Herick's notes of the appraisal hearing, Plaintiff's Exhibit T, transcript of his deposition, page 127, and I ask you if this is a correct statement of your testimony in regard to this schedule R-1 relating to logging:

"It was explained that this had been prepared on the theory that by producing logs the value would absorb some of the continuing expenses set up in schedule two. Explained that the 85.7 per cent represented the estimated percentage of general overhead expenses which were applicable to the operation at Standard, and that the [110] remainder, or 14.3 per cent was considered applicable to the operation of Texas and other out of California properties."

Do you recall so testifying?

A. Yes, they had to be excluded because they were not covered by the insurance policies.

Q. And then immediately following that, is it not a fact that you stated that the 20 per cent of overhead estimated as applicable to logging had been pulled out of the air, but was believed to be fair.



(Testimony of Frank Momyer.)

“Upon questioning, he—” Mr. Momyer, “said that he knew of no basis that could be defended as a really scientific basis for allocation of overhead to logging.”

Do you recall so testifying before the appraisers?

Mr. Whittaker: He also so testified here.

A. I think that's right.

Q. (By Mr. Levit): Now you are aware of the fact, are you not, Mr. Momyer, that Mr. Herrick took the position that on the logging overhead, the company's allocation of 20 per cent, which really amounted to 25 per cent in comparison with the insurer's 44 per cent, was undeniably too low? You knew that, did you not?

Mr. Whittaker: Knew what, that that is what Mr. Herrick said?

Q. (By Mr. Levit): That Mr. Herrick took that position in [111] the course of the appraisal.

The Court: Read that question.

(Record read by the Reporter.)

A. I think that was discovered when Mr. Herrick's deposition was taken, some time after the findings were made. I don't—

Q. In order to refresh your recollection on that, Mr. Momyer, I will state that the statement to which I had reference is contained in Plaintiff's Exhibit V, which is a memorandum dated May 2, 1947, prepared by Mr. Herrick, and which he testi-

(Testimony of Frank Momyer.)

fied he prepared prior to the actual rendition of the award which was dated the same day?

A. But I did not see that document, because he prepared that for his own records. It was only in the depositions that that document was brought to light.

Q. Well, in other words, your testimony is that you don't know whether that is correct or not?

A. I think he made that statement in the deposition. I know that. But whether he made it prior directly to us, I do not believe he did.

Q. Now we have already referred—pardon me.

The Court: I don't believe I get the force of that statement that Herrick made. Does that mean that he thought that the overhead allocated to logging operations was too low?

Mr. Levit: Well, your Honor—

The Court: I mean allocated by Pickering.

Mr. Levit: The only point that we make—I couldn't myself, and I don't think the Court could, recompute all of these calculations. My point simply is that these figures that were presented to the appraisers were merely estimates; they involved matters of judgment, matters of accounting theory.

The Court: I got that. But—

Mr. Levit: That is all. I am not attempting to establish—

The Court: I am concentrating now on that statement of Herrick's. I don't quite understand it. Maybe I didn't follow it completely.

(Testimony of Frank Momyer.)

Mr. Levit: Well, my point is that it merely shows that the appraisers, and in particular Mr. Herrick in this case, did not accept the allocations and the figures that were contained in the proof of loss with respect to these calculations of logging overhead. He said they were undeniably too high, or too low—I don't care whether he said too high or too low. The point is that the appraisers undertook as a matter of fixing this award, making this award, to ascertain these things for themselves and in accordance with their best judgment.

I had just one other point that I wanted to refer to, your Honor, but I think that probably counsel will want to conduct some redirect, and if it is agreeable, I would let him do that now and not waste time looking for that last [113] reference.

The Court: You are aware of the fact that I am going to leave here early?

Mr. Levit: Beg your pardon?

The Court: You are aware of the fact that I have to go to leave here early?

Mr. Levit: Yes. I wasn't aware of the exact time.

Mr. Whittaker: In twelve minutes.

The Court: Yes. You don't need to hurry, because we can meet again at 9:30, if you would like to, tomorrow morning—unless it is a hardship on you.

Mr. Levit: I would think it would be advisable. I don't know how many more witnesses counsel

(Testimony of Frank Momyer.)

has. I will say this, that our case in rebuttal will be very brief, your Honor.

Mr. Whittaker: It would be a great convenience to us, if possible, your Honor, to conclude tomorrow.

The Court: Well, if not, we can proceed on Monday afternoon. There are some law and motion matters here Monday morning.

Mr. Whittaker: Shall I proceed?

The Court: Yes.

### Redirect Examination

By Mr. Whittaker:

Q. Mr. Momyer, I desire to ask you just a few questions. I hope I may be direct and brief. First, I ask you with respect to the use of that word "depreciation" as included in item two of the insuring clause: Was that word [114] in the policies as originally furnished to Pickering?

A. The first policy——

Mr. Levit: Just a moment, I don't understand that question at all.

The Court: He is trying to bring out the point that as originally furnished, the policies didn't include the word "depreciation."

Mr. Levit: You mean that the form was changed after the policies were originally issued?

Mr. Whittaker: The policies were sent back and the insurance companies told that we wanted a specific coverage of depreciation, and the policies

(Testimony of Frank Momyer.)

were accordingly altered and that word "depreciation" was put in insuring item No. 2, where it appears in the typewritten portion of the policies now mimeographed in the exhibit before the Court.

Mr. Levit: If counsel says that it is the fact, I will stipulate to it.

The Court: Well, that is stipulated to then.

Mr. Whittaker: I say that is the fact, because Mr. Momyer has told me that that is the fact.

Mr. Levit: Well, I believe you. I don't think it is material, your Honor, at all when they were put in. That was the contract anyway.

The Court: Well, at any rate, it may have some bearing on how the contract would be construed—maybe it is to be [115] construed most strongly against the insuring company.

Mr. Whittaker: You will find it is a little odd, where it is situated in the policy. That is my point.

Q. Now, Mr. Momyer, I believe you have made it clear, but in one question, let's cover this matter. What is shook?

A. Shook, as we make it up there and the generally used term for shook, is that it is small boards used to make boxes.

Q. Do you make boxes?                      A. We do not.

Q. It is larger boards cut into smaller boards?

A. That is all.

Q. Now counsel for plaintiffs near the beginning of his cross-examination of you offered Plaintiff's Exhibits I and J, which were letters written by



(Testimony of Frank Momyer.)

you to Mr. Wither in connection with the settlement of the direct fire loss on Pickering's plant, did he not? [116]

Q. Now those policies of insurance indemnified Pickering to the extent of the actual cash value of physical structures destroyed by fire?

A. That is correct.

The Court: And also stock, as I understand it.

The Witness: Stock.

Q. (By Mr. Whittaker): And also stock in process of manufacture?

A. That's right. There were two different policies involved besides the U and O, one being on the stock alone and one being on the buildings and machinery, the physical properties.

Q. Now were those direct fire policies reporting form policies?

A. The stock policy was a reporting form policy.

The Court: By that you mean periodically you had to report the amount of inventory?

The Witness: At the end of each month you had to report the amount of inventory.

Q. (By Mr. Whittaker): You make a deposit premium to being with and then you report monthly, do you not? A. That is correct.

Mr. Levit: It is called "provisional insurance," in other words.

Mr. Whittaker: Yes.

Q. And then the premium is adjusted at the end of the period? A. That is correct. [117]

(Testimony of Frank Momyer.)

Q. Now next, counsel for plaintiff has directed attention to the fact that in the Robinson-Nowell report, there are found certain prices of lumber not sold but set down on O.P.A. price basis. You have testified that that was for informational purposes of the company only, have you? Is that right?

A. Yes. You are referring to the charge to the box factory for the lumber?

The Court: Charged to the box factory at the end of the green chain for lumber.

Q. (By Mr. Whittaker): Is that right, is that what it is? A. Yes.

Q. All right. Now counsel for the plaintiff has also called attention to the fact that within that report are certain figures purporting to show an allocated cost for light lumber using O.P.A. prices at the green chain, is that right?

A. Yes. You are referring to the allocated cost for income tax purposes?

Q. Yes.

A. On the basis of nine segregations?

Q. Yes.

Mr. Levit: Pardon me, your Honor. We have been putting quite a bit of emphasis on this expression, "at the green chain."

The Court: I understand.

Mr. Levit: The only significance of that is, as I understand it, as far as I know, when lumber comes out of a sawmill, [118] this particular grade of it, it is called "box lumber," and from that point

(Testimony of Frank Momyer.)

then it is put into the box factory. Now I don't think, as far as I know, there is any distinction between whether it is on the green chain or out in the yard or whether it is at the door of the box factory.

Mr. Whittaker: We ought to say "the diversion point," to be accurate.

Mr. Levit: That's right.

The Court: I understand what you mean.

Q. (By Mr. Whittaker): Yes. Now, Mr. Momyer, addressing our attention to this so-called allocated cost, these nine groups, how many different grades and selling prices of lumber was Pickering producing in the year 1945?

A. I would say well over a hundred.

Q. Now then, is this what was done: there were nine different groups made up, embracing nine different sales steps or prices, rather, in the lumber sold as lumber?

A. No, those nine groups included a grouping of various prices in each group. In other words, we didn't separate each and every sale by the actual price of the sale. One group took in the uppers, for instance, and the prices in that group for uppers, which varied according to thickness and grade and so on, were grouped there.

Q. All right. Now that is in one group, is it?

A. That is in one group. [119]

Q. Now how do you arrive at the price used within that group?

(Testimony of Frank Momyer.)

A. Well, that would be on the basis of the sales made in that group at varying prices.

Q. Well, but what I mean, what I am getting at, is, you say you had numerous different sales prices of lumber within that one group. Now how do you come out with one single price?

A. You average that for the group.

Q. That is the point. Then each one of the groups is an average of all the selling prices of the lumber within that group, is that right?

A. That is correct.

Q. That is what I wanted to get over. So that is not a true allocated cost?

Mr. Levit: Just a moment. I object to the question on the ground that it is leading, and this is redirect examination—it is not cross-examination.

The Court: Well, I think it is quite obvious.

Mr. Levit: It is obvious that it is not an allocated cost in the way the witness says you have to allocate cost, by a hundred grades, but it is an allocated cost in the way it is usually done in the lumber business.

The Witness: No, it is not, counsel.

Mr. Levit: Well, that is our position, at any rate.

Mr. Whittaker: Now just a couple of more questions.

Q. To be sure that I am clear that this matter is in the record, [120] I believe you stated that the realization for box shook in the year 1945 in the

(Testimony of Frank Momyer.)

three months preceding the fire, after deducting the manufacturing cost in the box factory, was \$51.90 per thousand?

A. That was for the fiscal year ending 3/31/45, Mr. Whittaker.

Q. Was it—— A. That test year.

Q. The test year. Now what was the overall realization after deducting any appropriate costs as in the previous year for finishing in the planing mill, of the lumber sold as lumber?

A. \$45.12.

Q. Now you actually sold the shook that was made in the box factory after the fire, didn't you?

A. We did.

Q. And what was the actual realization thereon?

A. On the same basis as the figure we quoted, it was \$47.60.

Q. And including the manufacturing cost to the box factory and the selling cost, you brought that figure up to the \$53, haven't you?

A. Well, this is the period following the fire—the other was the period preceding the fire.

Q. Yes. But I say, adding on, now, the box factory manufacturing costs and the selling costs of the shook and the underrun, you came out, as you have previously testified, with this \$53.51 actual cost against a realization of \$60.22, and a net profit [121] therefore of \$6.71 per thousand?

A. Oh, yes, we have the gross realization, sales realization was \$6.22 and after taking off costs,——

The Court: That is after the fire?

The Witness: After the fire.



(Testimony of Frank Momyer.)

A. (Continuing): —we obtained \$6.71 per thousand realization.

Q. (By Mr. Whittaker): Now, Mr. Momyer, I think this is obvious; it was advanced by Mr. Levit as a theory that in an accounting period wherein all the production has been actually sold and converted into money, you come out at exactly the same place, whether you use actual or allocated costs?

Mr. Levit: Just a moment. Counsel is mistaken in using the term “actual.” He should have said “average.”

Q. (By Mr. Whittaker): Well, I will adopt that word “average.”

The Court: No matter what cost basis you use, it came out the same.

Q. (By Mr. Whittaker): The same place?

A. Sure, because——

Q. Now this question: Did you in the accounting period after the fire sell all of the production?

A. Of the box factory?

Q. Oh, yea.           A. Yes, we did.

Mr. Levit: Is it your contention, counsel, that you will come out with the same profit from the box factory whether you [122] use the average cost that the witness used or whether you use allocated cost? Is that what you are driving at?

Mr. Whittaker: Now I will develop the matter—of course I know the Court has got to get away. I have kept you five minutes too long.

The Court: That is all right. Suppose we con-

(Testimony of Frank Momyer.)

tinue now until 9:30 in the morning and maybe we can go right on through to 4:30 in the afternoon and get through with the thing.

(Whereupon a recess was taken until tomorrow, Friday, June 10, 1949, at 9:30 A.M.)

Morning Session

Friday, June 10, 1949, at 9:30 o'Clock

The Clerk: American Insurance Company vs. Pickering Lumber Company, on trial.

Mr. Levit: Your Honor, before we proceed with the examination of the witness that was on the stand, I would like to make a brief reference to Plaintiff's Exhibit X for identification. That statement was prepared for us by Mr. Baker, who is an accountant for the insurance company, and he tells me this morning that Mr. Momyer was correct in his statement that the \$55,000 item actually was included in the claim in the \$742,000 total. So I want in all fairness to point that out. I don't think that it has any bearing whatever on what is intended to be presented by this presentation; it was just intended to summarize the differences between the appraisers on one hand, the insurance company's computation, and the claim on the other. I think it probably does that, but it is purely a matter of argument, and we will not attempt to offer it because Mr. Momyer was correct in his criticism that in the claim column, that \$55,000 item was not in addition to——

The Court: It was a depreciation item, a part of it, wasn't it?

Mr. Levit: Well, the \$55,000 item was depreciation, and the decking cost and some other items.

The Court: You added them in twice? [124]

Mr. Levit: That's right, your Honor.

The Court: All right, proceed.

Mr. Whittaker: Mr. Momyer, please.

FRANK MOMYER

resumed the stand; previously sworn.

Redirect Examination

(Resumed)

Q. (By Mr. Whittaker): Mr. Momyer, did the insurance companies, the plaintiffs, through their auditor, Mr. Baker and others, actually examine Pickering Lumber Company's books prior to the time the proof of loss in evidence was filed with the insurance companies?

A. Yes, they did. Mr. Baker and some other members of his staff spent several days at our plant at various times, I believe, and secured data there that they wanted. We gave them full access to the books and records there.

Q. Did you in computing profits prevented in the proof of loss, both for the nine months' period and the one year period following the fire, deduct depreciation on the sawmill that occurred in the test year, which sawmill was later destroyed by fire?

(Testimony of Frank Momyer.)

A. I did.

Q. Then to see if I understand, in computing profits prevented, you take in one column the gross profits that would have been made under the formula of the test year, in another column the [125] expenses that would have been incurred, including depreciation on the sawmill that was destroyed by fire on July 7, 1945; then you deduct the total of those expenses from the gross income and the balance is the amount of the profits prevented; is that correct?

A. That's correct. It was six sixty eight in this case, as shown by the proof of loss.

Q. Now I think this is already in the record, but I am not sure. We have talked about it, all of us, but I am not sure the record shows the fact. Explain to the Court whether O.P.A. prices are simply X dollars, or X dollars plus freight from basing point of Susanville, California.

A. The O.P.A. prices include the base price and the freight on the Susanville rate.

The Court: Freight differential, you mean?

The Witness: Well, you develop the differential by the freight from Susanville less the actual freight to destination. In other words, if the freight from Susanville is 30 cents per hundredweight to Modesto, and the actual rate from our plant at Standard to Modesto is 10 cents or 15 cents—I don't remember the exact rate—then your differential, your savings there, is the difference between 30 cents and 15 cents, or 15 cents per hundredweight. Because you only

(Testimony of Frank Momyer.)

have to pay freight on the actual rate. Therefore you save in your pricing of that lumber the difference between 15 cents and 30 cents, and that is a part [126] of the price that you are allowed to charge for that lumber.

The Court: In other words, you are allowed to charge 30 cents for the lumber?

The Witness: That is correct, even though you do not have to pay it.

The Court: Even if it doesn't cost as much?

The Witness: Yes, even if it doesn't cost as much.

Mr. Whittaker.: I think that is all. Thank you.

Mr. Levit: Your Honor, this will be brief, but I am not sure that all of my questions will be strictly re-cross. I said yesterday that I wanted to review my notes, that I have one or two other questions that I would like to ask if counsel and Court will allow.

#### Re-Cross Examination

By Mr. Levit:

Q. Now on this question of depreciation on the sawmill that burned, Mr. Momyer, that was an item that of course into the calculation of your net profit, but you say it wasn't included in there. In other words, when you calculated the net profit for the test year, you deducted as an expense the item of depreciation on the sawmill; that's right, isn't it? That is what you said?



(Testimony of Frank Momyer.)

A. Deducted that from the gross realizations to arrive at the net profit.

Q. My impression was that the claim—that that was one of the items that was omitted also from the continuing charges, fixed [127] charges and continuing expenses for the test year. You remember there were two items that went to make up the insurable values, the net profit is one and the fixed charges and continuing expenses was the other?

A. It was not omitted for the test year as far as profits were concerned, and it was not included in our claim, either in the nine month period of the twelve month period of continuing expenses following the fire. It was eliminated from both the nine month period and the twelve month period, but in order to calculate the correct profit, you would have to assume an operation that would be consistent with the test year, and of course the mill still existed during the test year, and naturally you would take off the depreciation in calculating the net profits. Otherwise you would get too much profit.

Q. All right. Well then, it was not correct, as Mr. Whittaker's question implied—and that is what I was getting at—that in calculating the net profit for the test year you eliminated consideration of the depreciation on the sawmill?

A. We deducted it.

Q. You mean you did actually deduct it?

(Testimony of Frank Momyer.)

A. We actually deducted it.

Q. From the gross realization to determine the net profit?      A. Correct.

Q. Certainly.

Mr. Whittaker: That is what I said, I believe, isn't it? [128]

The Court: That's right, that is what he said.

The Witness: That is correct.

Mr. Levit: Well, your Honor——

The Court: I got the impression that they did that in determining net profit because in determining net profit in a test-year they would have to transpose that to the year of the fire and they would have to assume the sawmill was up in order to determine profit. They would have to deduct depreciation from that.

Mr. Levit: That is exactly my point, your Honor. I just misunderstood then.

Q. Then when you added to the net profit the fixed charges and continuing expenses for the test year to determine insurable values, that is, the fixed charges and continuing expenses that would have been earned normally, and so forth, then you eliminated the item of depreciation on the sawmill from that computation, didn't you?

A. Because the sawmill did not exist, and we didn't——

Q. I don't think you understood my question.

(Testimony of Frank Momyer.)

You eliminated the depreciation on the sawmill in determining the insurable values so far as the item of fixed charges and continuing expenses was concerned, did you not?      A. That is correct.

Q. So that you included the item when you calculated the net profits for the test year; in other words, in computing your net [129] profit from your gross realization all of your expenses and one of the expenses included in that computation was the depreciation on the sawmill, wasn't it?

A. Yes, sir.

Q. Well, when you came down to figuring your fixed charges and continuing expenses for the test year, you eliminated that item, didn't you?

A. I did.

Q. You didn't take it into consideration at all?

A. I did.

Q. You mean you did not take it into consideration?      A. Did not take it into consideration.

Q. Right. And——

The Court: What would the ultimate result be? One would cancel the other out?

The Witness: That is right, that is what happened.

Mr. Levit: Well, your Honor may bear this in mind, that the policy insured two separate items; it insured net profits and it insured fixed charges and continuing expenses. Now the whole point at issue here is a comparatively simple one. They included in their calculation of net profit for the test year,

(Testimony of Frank Momyer.)

for obviously correct reasons, the amount of depreciation on the sawmill. But when they came to the second part of their calculation of insurable values, the fixed charges and continuing expenses that would normally have been earned during the test [130] year, they eliminated that item from consideration entirely. Now when the appraisers came to make their award, they immediately noticed that, and properly, as we will show—I mean, it seems perfectly obvious—added back that \$15,000 to the fixed charged and continuing expenses.

The Court: That is one of the points in dispute.

Mr. Levit: Yes, that is one of the points in dispute, that's right.

Q. Now, of course in figuring your loss of fixed charges and continuing expenses, you did not include any proportion of the depreciation on the sawmill because actually, since the sawmill was burned, there was no actual depreciation on it, is that not correct?

A. We did not include it.

Q. Yes. Now Pickering Lumber Company in this appraisal, Mr. Momyer, did not take the position that the method by which Pickering kept its books was controlling on the appraisers, did they?

A. I would say not.

Q. In fact, it was clearly understood at all times by everybody, including Pickering and the appraisers, that if the appraisers considered that the books, the method of keeping the books, was er-

(Testimony of Frank Momyer.)

roneous, that they could reject them, isn't that so?

A. We made no effort to control the appraisers in their findings. [131]

Q. Isn't it a fact that in the brief which you presented to the appraisers through your counsel, Pickering Lumber Corporation's, that on page 11 at the bottom you said, "It is well settled that the method by which the assured's books are kept is not controlling, since the policy insures against the loss of profits, not against the result shown by an erroneous method of keeping books"; you recall that statement in the brief that was submitted to the appraisers, do you not?

A. I certainly do.

Mr. Whittaker: I may save time on it. We certainly so contend today.

Q. (By Mr. Levit): And you told the appraisers again on page 22, did you not, that "while it is true that in computing the profits prevented the appraisers should disregard any erroneous entries on Pickering's books," and so forth—you told them that they should do that, isn't that a fact?

A. That is what our counsel told them. You must realize I am not a lawyer, and what he says there is his own words, not mine.

Q. At the same time, you were at that time the chief accounting officer for the Pickering Lumber Company, were you not? A. Correct.

Q. And you were following this claim very



(Testimony of Frank Momyer.)

closely, and it was your responsibility to do that, wasn't it?      A. That's right. [132]

Q. And you were consulted, were you not, with respect to statements about the books and the figures of Pickering Lumber Company by the attorneys in the course of all of this appraisal?

A. I certainly was.

Q. And you told the appraisers too, didn't you, in the appraisal—or Pickering did—that if the appraisers felt that there was a more equitable method of determining the profit on the box factory than by the use of average costs, that the appraisers were free to use that more equitable method?

Mr. Whittaker: Are you referring to what is in the brief, Mr. Levit?

Mr. Levit: Yes, I am referring to page 43 of the brief.

Mr. Whittaker: Then I submit that it is in evidence and that it speaks for itself. It was not a document prepared by this witness.

The Court: Well, I know, but if you are referring to the brief, why, I think the objection is good. But the question didn't refer to the brief. The question referred to what this witness did.

Mr. Whittaker: What this witness said, that's right.

Q. (By Mr. Levit): Can you answer the question?

A. I would say, Mr. Levit, that I again did

(Testimony of Frank Momyer.)

not try to control the appraisers, I tried to give them our side of the case.

Q. But I mean, it was Pickering's understanding, and the mutual [133] understanding of Pickering, the insurance companies and the appraisers that the appraisers were free to reject any methods or any entries on the Pickering books that they thought to be erroneous; that was understood, wasn't it?

Mr. Whittaker: That calls for a conclusion.

The Court: That calls for a conclusion, counsel, yes.

Mr. Levit: All right, I will withdraw it.

The Court: The way you framed your question in the first place was whether or not he made the statement to the appraisers.

Mr. Levit: I realize that, your Honor.

The Court: And that question could be answered, but he hasn't answered that question.

Q. (By Mr. Levit): Mr. Momyer, I understood you to say on direct examination that the matter of an underrun on the box factory was the usual thing in the box factory operation; did I understand you correctly?

A. As a general rule it is, yes, sir, although there have been years when because maybe we sent over some waste material that it wasn't practical to try to measure the footage on, just a little bit of scrap here and there, that we might have encountered an overrun and during the period of

(Testimony of Frank Momyer.)

O.P.A. ceiling prices, there were cases when they allowed you to charge, say, for a two inch board when in fact you only used an inch and a half board in the manufacture of certain box shook. Therefore that would create an overrun because you are dealing then with [134] the footage that was allowed under the regulations to be charged to your customer, but such footage was not actually put into production of the shook.

Q. But it is a fact, is it not, that the test year which all parties agreed was to be taken as the basis for calculation, did show an overrun in the box factory, did it not?

A. I am sure that is true.

Q. Yes.

A. But after the fire we had an actual experience, and that actual experience did not develop an overrun.

Q. Now one more question. You testified regarding the matter of freight differential at some length, and I believe you pointed out that the average that you calculated was 69 cents, freight differential per thousand feet.

Mr. Whittaker: Average?

Mr. Levit: Average.

A. I think that was a figure that appears in some of our calculations, and as I explained to you at the time, it includes all sales of lumber which are shipped all over the United States, some going to the Far East, and those grades of lumber would

(Testimony of Frank Momyer.)

not in all cases produce a freight differential. In other words, it would cost you as much actual freight as the basing point of Susanville, because the freight rate in a lot of cases going to New York or Philadelphia or some eastern points are exactly the same as from Susanville, that they are from Standard. But [135] we wouldn't ship the type of lumber that goes in a box factory to a point of that kind, because we can sell it here, where it is used in California, and that is where we would sell it if we were going to sell it on the market—is where we could obtain the best advantage from selling.

Q. And I think you also testified, Mr. Momyer, did you not, that in general the freight differential was earned largely on the upper grades of lumber and that on box lumber the freight differential was smaller and minor?

A. No, I wouldn't say that.

Q. You wouldn't say that?

A. No, because freight rates from Susanville to Modesto are the same, whether it is high grade lumber or low grade lumber, and the actual freight from Standard to Modesto is the same regardless of whether it is high grade lumber or low grade lumber. They charge you on the weight, not on the grades or anything pertaining to grades.

Q. What would you say, then, was a proper figure for freight differential on the average, if the 69 cent figure was not correct, which you used for

(Testimony of Frank Momyer.)

a presentation of your claim to the insurance companies?

A. We made no freight differential claim to the insurance companies. They asked us for some figures on it, and we gave them some figures on the basis of Modesto.

Q. But you did present to the insurance companies in connection [136] with the stock loss certain figures, and all of those figures related to freight differential of 69 cent average. Those are the figures that you used in calculating your own inventories, aren't they?

A. I think so, and I think we were liberal in giving them that basis, because we took the average from experience, and the lumber that was on the green chain was made up of various grades and species. Therefore we tried to be fair in that and take the average.

Q. How much did the appraisers take into consideration as freight differential in fixing the price on the lumber to the box factory?

A. I have said it before, I believe, that I have no information on that. The appraisers did take some figure, but I do not know. The figure that we have seen is a charge to the box factory for that lumber, and that is, I believe, \$31.55, and it is not broken down. We are told that it is the O.P.A. sale prices, and that a freight differential was considered but what that is I do not know.

Q. Aren't you aware of the fact that the ap-



(Testimony of Frank Momyer.)

praisers allowed a freight differential in that \$31.55 figure of \$1.71?

A. They have said they did, but I do not believe that I know the amount that they did include in there.

Q. All right.

Mr. Levit: I believe that is all. [137]

### Further Redirect Examination

By Mr. Whittaker:

Q. Just on that question if I may ask one more. You have read Mr. Herrick's deposition; I think you did, have you not, Mr. Momyer?

A. Well, I believe I have, Mr. Whittaker. It has been some time ago since I read it.

Q. In that he states that they allowed O.P.A. prices and then indulged a "theoretical sale" of one half of the lumber that was manufactured into shook after the fire for delivery to Modesto and the other half at Fresno, and in that manner they obtained the freight differential, and then they averaged the differential between the two, as I think you will see he testified.

The Court: Who did this?

Mr. Whittaker: The appraisers.

The Court: The appraisers?

Mr. Whittaker: Yes. That is what Mr. Herrick testified.

Mr. Levit: What they did, counsel, was that they were trying to give the insured a break on the freight differential, and they took a favorable

(Testimony of Frank Momyer.)

one and they got it more or less in that way, and it came out to \$1.71.

Mr. Whittaker: I am just merely trying to tell your Honor what the testimony in Mr. Herrick's deposition is.

The Court: Yes.

Mr. Whittaker: That is all, Mr. Momyer. Thank you, sir. [138]

(Witness excused.)

Mr. Whittaker: May we have just a half minute, your Honor?

The Court: Well, I think it is almost ten o'clock. Before you go on with anything else, let's call the calendar. Well, we have to wait on the United States Attorney, so you may go on.

Mr. Whittaker: Just a half minute, if you please, your Honor.

(Slight pause.)

The Court: You may proceed.

Mr. Whittaker: If the Court please, the defendant rests.

Mr. Levit: I think perhaps we had better wait until after ten o'clock, your Honor. We have a witness in rebuttal, your Honor.

(Whereupon, following the calling of the calendar, a brief recess was had.)

The Clerk: The case of American Insurance Company and others vs. Pickering Lumber Company, for further trial.

ROLLIN P. RODOLPH

called on behalf of the plaintiff in rebuttal, sworn.

The Clerk: State your name to the Court.

A. Rollin P. Rodolph. [139]

Direct Examination

By Mr. Levit:

Q. Mr. Rodolph, you are an accountant, are you not?

A. Yes, I am.

Q. And you are the senior partner of the firm of Rollin P. Rodolph & Company?

A. Rollin P. Rodolph & Company.

Q. And what is the business of that firm?

A. Certified public accountants and doing auditing, tax work and other accounting work including cost work.

Q. How long has that firm been in existence?

A. Since July 1, 1940.

Q. And where is it located?

A. In San Francisco, and with offices in San Francisco and Klamath Falls, Oregon.

Q. And you yourself live in San Francisco, do you, Mr. Rodolph?

A. I do.

Q. But you spend a good deal of time in Klamath Falls?

A. And other places out of San Francisco.

(Testimony of Rollin P. Rodolph.)

Q. Yes. But you have an office—your firm has an office in Klamath Falls?      A. It does.

Q. Now what is the major purpose of maintaining an office in Klamath Falls?

A. The Klamath Falls office was started to serve our clients in [140] the district, most of which were lumber concerns.

Q. Yes. And what would you say of the total practice of your firm as represented by lumber clients?      A. At least 40 per cent.

Q. And how many lumber companies roughly would you say your firm represents for these purposes?

A. Well, the last time I counted, there were between 40 and 50 lumber operators.

Q. Will you name just a few of your more important lumber clients?

A. Well, Mt. Whitney Lumber Company, Clover Valley Lumber Company, Aewanee Box Company, Big Lakes Box Company, American Box Corporation.

Q. Do you do any work for Weyerhaeuser?

A. We are consulted by Weyerhaeuser Timber Company on their operations in Klamath Falls, yes.

Q. And Weyerhaeuser, I believe, is one of the largest, if not the largest, lumber operators in the world, is it not?      A. I think so.

Q. Now for these concerns, what is the nature of your work? These lumber concerns?

A. Well, it varies. Accounting practice varies.

(Testimony of Rollin P. Rodolph.)

We do auditing for some of them; others, cost work; others, tax work.

Q. And do some of these firms that you represent operate box factories?

A. A large number of them do. [141]

Q. And do some of them have what we may call an integrated operation, which would include the actual logging of timber and the putting of timber through sawmills and through box factories? A. Yes.

Q. Now you said that since 1940, that has been your occupation. Prior to that, with particular reference to the period from 1924 to 1936, what was your occupation, or what was your connection?

A. Well, from 1919—actually from 1918—to 1940, I was either an employee or a partner of Robinson-Nowell and Company. With reference to the years 1924 to 1936 I had done for that firm considerable cost comparisons of different lumber mills in northern California and southern Oregon district. I had also made some general cost comparison, I believe, in 1935, of a large number of mills in the California area.

Q. From the years 1927 to 1936, it is a fact, is it not, that you were a partner in the firm of Robinson-Nowell and Company? A. That is true.

Q. And I believe you stated then that between 1924 and 1936 you made as a part of your work with that firm cost comparisons of lumber operations? A. I did.



(Testimony of Rollin P. Rodolph.)

Q. About how many of those a year do you suppose you made over that period? [142]

A. Well, it was an annual report during those periods. Where we went into the operations and analyzed the cost for the year, showed each operator the costs as we had rescrambled them for him, and the consolidation of the whole district, also the lowest cost.

Q. And did that study include allocation of costs as between box factory and other operations of these concerns?

A. Yes.

Q. You are a graduate of the University of California, are you not?

A. That's correct.

Q. And you got your A.B. in 1918?

A. Correct.

Q. When did you first enter the profession of public accountancy?

A. After World War I, on December 27, 1918.

Q. And when did you pass your C.P.A. examination in California?

A. In November, 1919.

Q. And when did you do your first lumber accounting work?

A. Sometime in 1919. I presume it was along in May or June.

Q. Are you the author of any books in connection with lumber, lumbering operations?

A. Well, the only thing that I did along that line was, I made the outline for the extractive industries for the Golden Gate College, and taught

(Testimony of Rollin P. Rodolph.)

there a year or two. Subsequently that was expanded and published. [143]

Q. And when you said "extractive industries," I take it you intended to include the lumber industry?

A. The lumber industry was included.

Q. Now do you recall in 1933 that you represented the National Wooden Box Association?

A. Yes, I did.

Q. The National Wooden Box Association consisted of box factory operators, did it not?

A. It did.

Q. And did some of the operators have also what we call an integrated process, from logging to box factory?      A. A portion, yes.

Mr. Whittaker: That is in 1933?

Mr. Levit: 1933, yes.

Q. Now for what period did you represent the box association?

A. That was done to set up the N.R.A. code. I assembled the figures.

Q. What did you do?

A. I assembled the figures here and spent, oh, two or three months in Washington at different times determining or proving to the N.R.A. that the average wage cost was not exceeded by the prices that were set up in the N.R.A. code.

Q. Now the N.R.A., of course, so far as price fixing went, was a minimum price fixing operation, wasn't it?      A. That's correct. [144]

(Testimony of Rollin P. Rodolph.)

Q. And as I understand it, then at that time you assembled cost figures on box factory operations for the purposes of the N.R.A. prices with respect to box shook, isn't that right?

A. That's correct, I had the figures on practically all the operators in the West, and we represented 65 per cent of the production in the United States of boxes.

Q. Now in 1942 do you recall that you represented a group of box factory operators and again assembled costs for another purpose?

A. Yes, I did.

Q. What was that purpose?

A. It was for representation before the Office of Price Administration on the prices of shook that were being published at the time. We assembled costs from practically all the box factory operators and presented those figures to the executives in control of prices for box shook in the O.P.A.

Q. Yes. And will you tell us, please, whether or not in compiling those cost figures for both the N.R.A. and the O.P.A. purposes, it was necessary to determine a price at which the box lumber was costed into the box factory operation?

A. It was.

Q. And on what basis did you determine that price?

A. Well, in the N.R.A. days the box prices were determined by the price that was set up for the

(Testimony of Rollin P. Rodolph.)

lumber and those were used in the figures. [145]

Mr. Whittaker: Pardon me just a moment. So that I may understand, those are the prices you used, aren't they?

Mr. Levit: That's right.

Mr. Whittaker: That is what I understood.

The Witness: Yes.

Mr. Whittaker: That is what I understood, but I wanted to be clear about it.

The Court: Those are the prices he gave to the N.R.A.?

Mr. Whittaker: Yes.

Mr. Levit: Well, in other words, if I understand you correctly, in costing lumber into the box factory operation, in the N.R.A. days you used N.R.A. prices on box lumber?      A. That's correct.

Q. Those were market prices, were they not?

A. They were mill prices.

Q. But they represented in place of market value in your calculations, did they not?

A. That's correct.

Mr. Whittaker: If the Court please, I think that question is leading.

Mr. Levit: I think it is leading. I am sorry.

Mr. Whittaker: He said he used the minimum values, and we all know that is right as a matter of law.

Q. (By Mr. Levit): Now when you presented or made up your cost calculations in 1942 for the O.P.A. purposes, what figures [146] did you use as

(Testimony of Rollin P. Rodolph.)

a basis for costing the box lumber into the box factory operation?

Mr. Whittaker: Just a moment. If the Court please, we object to the question for the reason that it is wholly immaterial what the figures are that the witness used in his presentations to the price administrator. The concern here is what the administrator from time to time published and what was in effect in 1945 under the plaintiff's theory.

The Court: Well, that may be true. On the other hand, there is question here about what is a proper accounting procedure, and this may throw some light on that.

Mr. Levit: Well, this is just a beginning, your Honor; I am going on to that point.

A. The price used was the market price at the time, the box lumber.

Q. (By Mr. Levit): In other words, the market price for box lumber. And in preparing your cost figures, did you use that price regardless of whether the mill in question, whether the operator in question was merely a box factory operator or operated an integrated operation?

A. It was used on the same basis for all mills; that is, market price.

Q. Yes. Now will you tell us, please, whether in your opinion that basis which you used in 1942 in determining the costs of box factory operation was a sound and proper accounting basis [147] and



(Testimony of Rollin P. Rodolph.)

in accord with recognized accounting principles?

Mr. Whittaker: We object to the question for the reason that it is wholly immaterial and irrelevant to any issue before the Court.

The Court: Well, I think it is preliminary. I will allow the answer.

Mr. Whittaker: I hope your Honor will understand that I am trying to protect my record.

The Court: Yes.

The Witness: I am sorry, would you read that?  
(Record read.)

A. It was.

Q. (By Mr. Levit): Now when the O.P.A. fixed the prices for box lumber in 1942, did they base those prices, if you know, on then existing market prices?

Mr. Whittaker: Just a moment, if the Court please; we object to that question as hearsay and as calling for a conclusion and reading minds of the legislative body.

The Court: Yes, I think that goes pretty far, Mr. Levit.

Mr. Levit: I will reframe the question. I think perhaps I can get at it in this way:

Q. Are you familiar with the general level of box lumber prices as they existed in 1942 prior to the issuance of O.P.A. ceiling prices?

Mr. Whittaker: We object to the question as immaterial [148] and irrelevant to any issue here.

The Court: I will let him answer that.

(Testimony of Rollin P. Rodolph.)

A. In a general way, yes.

Q. (By Mr. Levit): And are you familiar with the prices, the ceiling prices, which the O.P.A. affixed in relation to box lumber?

A. Yes, in general.

Q. And will you tell us, please, what was the general relationship between the two sets of prices?

Mr. Whittaker: Just a moment, if the Court please; I object to the question as immaterial to any issue here, irrelevant and calling for a comparison of matters of law.

The Court: Well, I will let him answer the question.

A. The market price, as I remember it, of box lumber, was slightly above the price that was set when the first lumber price schedule came forth. The price which was set, as I remember it was \$25.50 per thousand feet.

Mr. Whittaker: That is in '42, Mr. Witness?

The Witness: In 1942.

A. (Continuing): And as I remember it, the price of box lumber was slightly in excess of that in the market at the time.

Q. (By Mr. Levit): How much in excess, do you recall?

A. A dollar or two.

Q. And at that time is it or is it not correct, if you know, that the policy of the government was to encourage the production [149] of lumber and to discourage the production of box shook?

Mr. Whittaker: Now just to keep the record

(Testimony of Rollin P. Rodolph.)

straight, I would even like to have the question answered myself, but it is not competent and I must object to it for the reason that it is asking for the governmental process.

The Court: Yes, I think that is good.

Mr. Levitt: Well, I think it is in evidence already, your Honor, and I can assure your Honor that I have a very definite purpose in tying this in with the issue.

The Court: Mr. Momyer has already testified to that.

Mr. Levit: Yes, he has, your Honor, that's right.

Q. Do you recall when it was that the raise in shook prices came about about 1942?

Mr. Whittaker: Are you talking about O.P.A. prices, Mr. Levit?

Mr. Levit: O.P.A. prices, yes.

A. First of all, the shook prices were relatively low, and along in October or November of 1943, the O.P.A. added table 3A to the price list, which in itself raised the shook prices quite considerably.

Q. Yes. And during the period of time during 1942 and 1944, did the O.P.A. ceiling prices of box lumber go up or down?

A. They went up.

Q. How much?

A. About \$3.00 per thousand feet. [150]

Q. In other words, very little in comparison with the raise in ceiling prices of shook?

(Testimony of Rollin P. Rodolph.)

A. That's correct.

Q. Now you are familiar, I take it, with the practices of accounting in the lumber industry, are you not?

A. Yes.

Q. In a remanufacture operation, in the lumber industry, is it or is it not the general practice to transfer lumber to the remanufacture operation at market prices?

Mr. Whittaker: Just a moment. If the Court please, I object to the question for the reason it is outside the issues in this case, it does not say what is meant by "market price" and that therefore it is immaterial and irrelevant to any issue before the Court in the form stated.

Mr. Levit: I think counsel's objection is well taken with respect to the term "market price."

The Court: Yes.

Q. (By Mr. Levit): Referring to the period before 1942 up to 1942, and so that we don't have any question of O.P.A. prices entering into it, and let us say also to the period since O.P.A. prices went out, what was the general practice of the industry, the lumber industry, with regard to the basis upon which lumber was costed into remanufacture operation such as a box factory?

A. In the great majority of cases, a raw material which is box [151] lumber or other remanufacturing product, was costed into the operation at the market value.

Q. In your opinion, Mr. Rodolph, is that a

(Testimony of Rollin P. Rodolph.)

proper accounting practice and in accord with sound accounting principles?

Mr. Whittaker: If the Court please, I object to the question as calling for an opinion upon a matter of law.

The Court: Well, I will overrule the objection; I think it calls for an opinion on the matter of accountancy.

Mr. Whittaker: Well, of course——

The Court: In other words, I am confronted with this: here the parties agree to appoint appraisers to determine what the loss of profits were. Well, certainly in determining what the loss of profits are, it is implicit that they must adopt some theory of accountancy. It may be that they have to also resolve theories of law, but they certainly have to resolve theories of accountancy. In other words, the appraisalship, it seems to me, would be absolutely worthless and needless if they are appointed to determine what the profits are, if they can't take into account some theory of accountancy.

What is the question there?

(Record read.)

A. Yes.

Q. (By Mr. Levit): Now, Mr. Rodolph, directing your attention to the lumber industry again and to the costing of box lumber into the remanufacture in the box factory, during the period [152] of the O.P.A., what was the practice, the general practice,



(Testimony of Rollin P. Rodolph.)

of the lumber industry with respect to the basis upon which that costing was done during that period?

Mr. Whittaker: I object to that question, if your Honor please, as calling for a conclusion, a practice, which may or may not have been consonant with the law.

The Court: Well, I will overrule it for the same reason.

A. The practice was to use the O.P.A. prices in most operations, the large majority of operations.

Q. (By Mr. Levit): You mean in the case of most operators? A. Yes.

Q. And that was true, was it, whether or not the particular operator operated only a box factory or an integrated operation? A. Yes.

Q. Now in your opinion, Mr. Rodolph, was that practice in accord with sound accounting principles and practices?

Mr. Whittaker: Just a moment. If the Court please, I object to that question as calling for a conclusion, irrelevant and incompetent, and invading the province of the Court on a matter of law.

The Court: I will allow it.

A. It was.

Q. (By Mr. Levit): Mr. Rodolph, in your opinion were the practices that you have testified to in your lumber industry with respect to the basis upon which lumber is costed into a [153] box factory operation provide a proper basis for the allocation

(Testimony of Rollin P. Rodolph.)

of profits as between the box factory operation on the one hand and the other operations of an integrated lumber plant on the other, pursuant to proper accounting principles and practices?

Mr. Whittaker: I object to the question for the reason that it calls for a conclusion, and even a legal conclusion; it is incompetent and immaterial to any issue here.

The Court: I will overrule it. It calls for the conclusion of an expert on accounting matters.

A. It was.

Q. (By Mr. Levit): Your answer is in the affirmative? A. Yes.

Q. In your opinion, Mr. Rodolph—I will withdraw that. The term “average cost” has been used in this case as meaning a cost of lumber at the diversion point—that is, after it goes through the sawmill—based upon the entire cost of production averaged over the number of feet produced. You understand that use of the term, Mr. Rodolph?

A. I do.

Q. In your opinion, would the use of “average cost” as a basis for costing lumber into a box factory operation in an integrated plant furnish a proper basis of allocation of the profit of the box factory operations as compared to the balance of the plant under proper accounting principles and practices? [154]

Mr. Whittaker: Just a moment, I object to the question for the reason that it calls for a conclusion

(Testimony of Rollin P. Rodolph.)

and a legal conclusion, and invades the province of the Court and is wholly immaterial.

The Court: I will overrule it.

A. It would not.

Q. (By Mr. Levit): Now, Mr. Rodolph, the principle of cost allocation is well recognized in the practice of cost accountancy, is it not?

A. It is.

Q. And as a matter of fact, is it or is it not in common use in the lumber industry? A. Yes.

Q. Now in referring to a joint products, principles of cost accounting in connection with joint products, and by "joint products" I mean products of varying kinds or grades that come as the result of a single process of manufacture—I refer specifically, for example, to lumber at the diversion point after it goes through the sawmill. Now in determining the allocation of cost, in using the principles of cost allocation in relation to the lumber business, or in relation to any cost allocation problem of a series of joint products, is it or is it not true that the number of grades or divisions into which the product, the end-product, is divided for purposes of cost allocation is a matter of accounting and management judgment? [155]

Mr. Whittaker: Just a moment. If the Court please, I object to the question as calling for a conclusion, not proper because it is a matter that is subject to opinion evidence, and therefore calls for

(Testimony of Rollin P. Rodolph.)

a conclusion, and it is immaterial here and is outside the issues.

The Court: I will overrule the objection.

A. It is.

Q. (By Mr. Levit): And in the lumber industry, in connection with the matter of cost allocation to grades of lumber, in general how many grades are used for cost allocation purposes?

Mr. Whittaker: If the Court please, I object to that question for what is general isn't an issue in this lawsuit.

The Court: I will overrule it.

A. It varies with the operation. You will find allocations into three or four classifications. You will find others in ten or twenty, and sometimes you will find someone that goes to a large group of allocations. Generally in the industry in which Pickering Lumber Company is associated—that is, the Pine and Associated Woods—the allocation doesn't exceed over twenty to thirty classifications.

Mr. Levit: That is all.

### Cross-Examination

By Mr. Whittaker:

Q. Mr. Rodolph, may I ask you a few questions, please? A. Certainly. [156]

Q. You formerly did the accounting work for Pickering, did you not? A. Yes.

Q. You made its audits, did you not?

A. They were done under my direction.

(Testimony of Rollin P. Rodolph.)

Q. Did you there set up any allocations, any allocated costs for lumber? A. No.

Q. Never at all, did you? A. No.

Q. Now you know that the Pickering operation is an integrated operation, don't you, Mr. Rodolph?

A. Yes.

Q. Do you know, too, that this action is one upon use and occupancy insurance policies?

A. Yes.

Q. Is it your understanding that those policies insured the profits of the box factory, logging, milling, planing, separately?

A. I do not know that.

Mr. Levit: Just a moment. Pardon me. I object to the question on the ground that it is not proper cross-examination, has no relation to any of the things that this witness has testified to.

The Court: Well, it may be preliminary. [157]

Mr. Levit: Well, it might be. The witness answered it anyway. He said he doesn't know one way or the other.

The Witness: May I explain my answer? I haven't seen the policies, and all I know about the case is what I have learned in the back of the room here.

Q. (By Mr. Whittaker): Now, Mr. Rodolph, if we are interested in the determination of profits, that means actual profits, and we have non-realizations, is it necessary then to indulge in a fictional



(Testimony of Rollin P. Rodolph.)

theory or do you know of the figures that present the actual facts?

A. Well, in accounting we very seldom have actual sales and production determined at the time when we make our accounting period. After all, accountancy breaks things off.

Q. That's right.

A. Now then, in determining profits, it is necessary to make certain estimations, always.

Q. When you haven't sold it?

A. When you haven't sold the complete product.

Q. Yes.

A. Now if you started and ended, the accountancy is simple.

Q. Now then, Mr. Rodolph, in determining the question of allocated cost, you have to have known results or theorize them, do you not?

A. Allocation is an estimate always.

Q. Yes. Now to be specific as to what I mean about this, you [158] must either know what are the sales prices actually received, or you must indulge a theoretical sale at market?

A. No, you may determine to the best of your ability but the value—not of the sale, but of the several products—are, and allocate on that value.

Q. All right. Then you have to assume that value?

A. That's correct.

Q. All right. Now that is, to assume that those goods, if sold at that junction or at that time would have produced so much money?

(Testimony of Rollin P. Rodolph.)

A. That might be one of the factors in determining value.

Q. Yes. Now, during a time when O.P.A. maximum ceiling prices were in effect, you couldn't use in determining such a fictional value, more than O.P.A. ceiling prices, could you?

A. Well, I don't know whether it is fictional or not, but you used O.P.A. ceiling prices.

Q. Could you use any more?

A. I don't think so.

Q. Why not?

A. Well, you couldn't sell it for any more, in the first place. Let me explain my answer.

Q. Yes.

A. In the first place, you couldn't sell it for any more, and if you kept on—then too, it would deteriorate. Lumber deteriorates. I don't consider, in my mind, that the value was [159] more than the O.P.A. ceiling price.

Q. Now, Mr. Rodolph, the reason you couldn't sell it for any more at that time was that it would be a crime to do so under the Office of Price Administration regulations, M.R.P. 540, wouldn't it?

A. Well, I don't know. That is a conclusion of law that I don't know whether I can pass on or not.

Q. All right. Of course you know that in the Court—I don't know this of my own knowledge, but I know generally and assume it happened here—there were people prosecuted criminally for the violation of O.P.A. ceiling prices. That is, attempting

(Testimony of Rollin P. Rodolph.)

to sell a product that was under ceiling prices for more than the ceiling prices. You couldn't do it, could you? It was a crime, wasn't it?

A. I think so.

Q. Are you familiar with the fact that O.P.A. ceiling prices dealt solely with the subject of the sale or purchase of covered commodities?

The Court: Of what?

Mr. Whittaker: Of those covered commodities?

A. I think so.

Q. Yes. Do you know the definition of the term "sale" as used in the O.P.A. maximum price regulation?

A. I don't think I do. It is a legal question, and I haven't researched it. [160]

Q. Do you know that it is there recited that O.P.A. prices shall not—the term "sale" shall not be construed—why do I theorize on it?

Mr. Levit: I think it would be better to refer to the regulations. May I see it?

(Regulation examined by counsel.)

Mr. Levit: That has nothing to do with lumber. This dealt with second hand automobile sales.

Q. (By Mr. Whittaker): Going on with my question, that the regulations provide, paragraph c of M.R.P. (that is, "Maximum price regulation") —540;

"Sale includes sales, dispositions, exchanges and other transfers and contracts and offers to do any of the foregoing. It includes conditional sales and

(Testimony of Rollin P. Rodolph.)

sales under rental contracts, lease agreements or other agreements. It also includes transfers by banks, finance companies or other persons discounting promissory notes, following taking of possession by such persons upon default of the person making such promissory notes. The term 'sale' does not refer to a judgment of losses made in connection with settlements of claims under policies of insurance against fire, theft, collision, other loss of property or other coverage, even though the right of subrogation may be involved. The terms 'sale, seller, selling, purchase, purchaser, and purchasing' shall be construed [161] accordingly."

Did you know that that definition of the term "sale" is included in the act?

Mr. Levit: Just a moment. If the Court please, counsel was reading from a price regulation that deals solely with second hand automobiles.

Mr. Whittaker: All right.

Mr. Levit: It has nothing to do with any of the things that this witness has testified to, it has nothing to do with lumber, and I think counsel knows very well that no such provision is found in the maximum price regulation dealing with lumber or any of its products.

The Court: Is that true?

Mr. Whittaker: No, this is the general maximum price regulation, 540, your Honor, the general maximum price regulation.

The Court: Well, I think I will let him answer

(Testimony of Rollin P. Rodolph.)

the question, if it is a general one. You asked him if he knew that?

Q. (By Mr. Whittaker): Yes. Do you know that definition?

A. Wait a moment. I think I would like to have that question read.

The Court: Well, the real gist of that question is, did you know that the term of "sale," as defined in that price regulation, excluded from the word "sale" fire adjustment losses? Did you know that?

The Witness: No, I did not.

The Court: That is the answer.

Mr. Levit: Now it will be stipulated, counsel, that that is an M.P.R.—what is it, 540?

Mr. Whittaker: 540.

Mr. Levit: 540.

Q. (By Mr. Whittaker): Mr. Rodolph, it is common, isn't it, for all businesses to set up for informational purposes a system of allocations so that they may know when to end a certain manufacturing process, when it ceases to be profitable? That's right, isn't it?

A. Either that or to make studies of such matters.

Q. That is what I mean. And that is the reason for the indulgence by accountants of an arbitrary value at times prior to actual sale of the products, isn't it?

A. I don't think that is the purpose. They may use arbitrary values in determining whether they



(Testimony of Rollin P. Rodolph.)

plan to continue or not, but the decision usually in business of whether an operation is to continue or cease is one of profit—whether it is more profitable to continue or to cease the operation.

Q. That's right, in the course of manufacturing. Now another purpose is for income tax purposes, isn't it?

Mr. Levit: Another purpose of what, counsel?

Q. (By Mr. Whittaker): Another purpose of using the allocations, as you step along? [163]

A. You mean, you may allocate cost for determining inventories for income tax purposes? Yes.

Q. That is what I meant. You expressed it much better than I did. Now when you get all through, though, the practical business operator wants to know how much the lumber, for example, actually cost him. He takes into consideration what were his out-of-pocket dollar costs, doesn't he?

A. Yes.

Q. And then he compares that with his actual realization to find out what he actually got out in dollars out of the business, doesn't he?

A. Yes.

Q. Now on this theory, Mr. Rodolph, of allocated costs, am I not right when I say that you first have to know what are the real or assumed realizations from the goods before you have a premise or basis from which to figure backwards in allocating the receipts to overall costs?

A. That is one of the factors. As I said before,

(Testimony of Rollin P. Rodolph.)

you determine value when you allocate. Now one of the factors is what you may get out of it in the future.

Q. That is getting right to what I am trying to say. You have said it again much better than I do. How do you determine that value when you haven't sold it?

A. Well, in determining values, many factors are taken into consideration. For example, I had an income tax case, and I [164] listed some thirty different factors we used in determining values. When you come to go into values, you use your judgment on all the information you have.

Q. You have to do it, because you don't have actual conditions at that time with which to deal, don't you?

A. Well, you have certain actual conditions.

Q. I shouldn't have said "actual conditions." Yes, you are right. You don't have any known recovery, is what I meant; that's right, isn't it?

A. It is an estimated recovery.

Q. Yes. Now you may actually sell the goods for far less or for far more, is that right?

A. Yes.

Mr. Whittaker: Excuse me just a second, your Honor.

Q. And of course if you have the known recovery, you don't have to indulge any estimates, do you?

A. No. You have a computation, probably, to

(Testimony of Rollin P. Rodolph.)

make, and a known recovery would be a very influencing factor on the value that you used.

Q. You worked with Frank Momyer, didn't you, when you were doing auditing work for Pickering? Or did you not? A. I did not.

Q. Now of course we had very abnormal conditions in the lumbering industry, and particularly in the box shook end of it, during O.P.A. prices and the duration of the war, didn't we? [165]

A. Yes.

Q. And there was a great demand on the part of the government for boxes, was that not true?

A. Yes.

Q. And you know, of course, that Pickering manufactured its own lumber for the supply of its box factory?

A. I suppose so. I don't know of my own knowledge.

Q. Oh, didn't you? Well, didn't they do that when you were accountant?

A. Well, that wasn't during the period of 1945.

Q. No, but they made boxes before that?

Mr. Levit: Well, you addressed your question, counsel, to the O.P.A. period.

Mr. Whittaker: Did I?

Mr. Levit: You started out to talk about the abnormal conditions that existed in the O.P.A. period.

Mr. Whittaker: Well, I mean, I started out—well, let's keep it straight.

(Testimony of Rollin P. Rodolph.)

Q. Now there were great scrambles during the period of the later years of the war, especially existing in 1945, for people trying to get lumber to make boxes or box shook, wasn't there?

A. For all lumber, yes.

Q. Now it has been stipulated—I mean, it is admitted by the pleadings here—that you couldn't buy any box lumber or [166] lumber suitable for the manufacture of box shook at O.P.A. prices in 1945 and following, through July 7. You know that is the situation, or was, don't you?

A. No, I don't. I could say that we have records of certain amounts of lumber passing at the O.P.A. ceiling as box lumber. Not very much, but there were sales and we have operators that sold maybe 8 or 10 per cent of their production as box lumber.

Q. Now was that prior to or after July 7, 1945, if you know?      A. Both periods.

Q. Now there may have been a case once in a while, wasn't there, wherein some small operator who was a manufacturer but did not have a box factory might have sold some occasionally in small amounts?      A. That's correct.

Q. That is what you mean?

A. No, I have seen larger operators sell a certain portion of their production as box lumber.

The Court: At O.P.A. prices?

The Witness: At O.P.A. prices, yes, sir.

Mr. Whittaker: I believe that is all. Thank you, sir.

Mr. Levit: No further questions. .

(Witness excused.)

Mr. Levit: The plaintiff rests, if the Court please.

[Endorsed]: Filed September 7, 1949. [167]

Friday, June 10, 1949

(After plaintiff rested, the following occurred:)

Mr. Levit: Now, the question arises as to the wishes of Court and counsel with regard to the matter of argument. Also I may recall to Your Honor's attention that the depositions that are in evidence have not been read.

The Court: I haven't read them.

Mr. Levit: No. I know that counsel has some ideas about leaving town. I realize he is from out of town and I would rather hear his suggestions as to what to do. As far as I am concerned, we are prepared to argue the case now. We are prepared to file briefs, or we would be prepared to argue it later or to do both. It is immaterial to me, except that I do want to make oral argument. I do want to have an opportunity for oral argument.

Mr. Whittaker: Your Honor, I do not want the fact that I am from out of town in any way to interrupt the normal functions of the court; and the fact that I am from out of the city may be entirely forgotten here.



Now, I have requested findings of fact and conclusions of law which I desire to submit to the Court. I would like to pass them up now. I also have a rather short brief on the merits.

The Court: You mean covering points not covered by the printed brief that you have already filed?

Mr. Whittaker: Yes, Your Honor, picking up where the [169] printed brief ends. That is a brief, as we call it, upon the law of appraisals, and then it picks up from there to set forth the issues, the facts and the figures in tabular form, and the law applicable to all the points involved on this hearing.

Now, there is one matter in the brief that I have a number of cases on and didn't put it in the brief, and therefore I would like to rewrite it and send it to Your Honor, to put in those several cases that really are a part of the subdivision on the box factory.

Now, so far as argument is concerned, if it is convenient and agreeable to Court and counsel, I would like for us to argue it today, inasmuch as Mr. Levit wants to orally argue it. I would just as soon submit it on briefs.

The Court: Well, as long as he wants to orally argue it, I think we had better go ahead with the argument and then you can go into briefs later.

Mr. Levit: Well, the only thought I had is this, Your Honor: While the trial of this case has been rather short, actually the principles of law involved are somewhat involved, as of course is apparent from the printed brief that counsel filed. And as

may be apparent from the fact that just the briefing of the cases alone that are cited here, with a few others, took this entire book (indicating). Now, in addition to that, as Your Honor realizes, the factual questions are by no means simple. There are accounting problems involved, and so forth. [170] I would say that I would like to have from one to two hours to present my side of the case. Now, I suppose—it is immaterial to me whether I open or close or who opens or closes, but I presume that the best way to do would be to let counsel go ahead, because he has the burden of setting aside the award. Then we will reply and then he can close.

The Court: Either way you want.

Mr. Levit: Well, it doesn't matter.

Mr. Whittaker: Either way is agreeable to me.

Mr. Levit: I don't care, but I imagine that would be the proper way to do it.

Mr. Whittaker: Either way is agreeable to me.

The Court: Well, I think the burden is upon you to set aside the award. Maybe you had better open and then close later.

Mr. Whittaker: Very well.

The Court: You can take as much time as you want. We can stay here this afternoon and come back Monday afternoon, if necessary.

Mr. Levit: Thank you, Your Honor.

The Court: I will take a recess now for about five minutes.

(Recess.) [171]

Monday, June 13, 1949

Mr. Whittaker: If the Court please, I would like now to hand up our brief on the merits, and one to counsel for the plaintiffs (handing to Court through the Clerk and handing to counsel). Knowing that Your Honor has a conference of the Judges at 4:00 o'clock, we don't care to make any further argument.

The Court: Very well. Do you wish to reply to this brief?

Mr. Levit: Yes, Your Honor. As a matter of fact, I have two briefs to reply to. I have the lengthy brief on the law, which I think requires a reply, and also this, which of course I haven't seen.

The Court: How much time do you want?

Mr. Levit: Oh, I would suggest——

The Court: You can combine both replies in one brief. [76]

Mr. Levit: Oh, yes, I intended to do that. I will be away for about ten days during the next two weeks, so I would like to have twenty to thirty days, Your Honor.

The Court: You couldn't make it a little sooner than that?

Mr. Levit: Suppose we say twenty, and I will try and get it in sooner. I would like to get it closed up.

The Court: As you know, I have only been on the bench for about a month or two, and I like to decide these things when they are hot with me, not when they are cold.

Mr. Levit: Very well, Your Honor.

Mr. Whittaker: The case has been pending for quite a long time, Your Honor, and we would very much appreciate as early a decision as is consistent with reason.

Mr. Levit: I have to leave town at the end of next week, the end of this week I should say. If I can get it done before then, I will. But this case has forced me to put off so many other things that I may not be able to do it by then.

The Court: Well, suppose the end of next week. That will be 14 days, won't it?

Mr. Levit: Yes. But I will be away all that week. I am going to Seattle.

The Court: Let's say three weeks, then, and you can have another week to reply. Will that be enough for you? Maybe not.

Mr. Whittaker: Would Your Honor make it ten days because it would take a little time in the mail perhaps? [77]

The Court: I am not going to hold you hard and fast to those time limits, I am just suggesting this thing to you so that you won't forget these facts.

Mr. Whittaker: Yes.

The Court: I make copious notes and all that, but I don't know how anybody else in a judicial position acts—however, that is the way I am trying to do it. And I remember that in the practice of the law, I would forget a client's case after I tried it, in about ten days. But I wouldn't hold you to those terms. However, let's try to meet them anyway.

Mr. Levit: Yes, Your Honor.

The Court: The matter will be marked submitted when the briefs come in?

Mr. Levit: Very well.

Mr. Whittaker: May I say before Your Honor adjourns, I wish to express my appreciation both to the Court and counsel for the courtesies that we have enjoyed in the trial of this lawsuit, and my pleasure in being permitted to participate in this trial.

The Court: We appreciate your fairness and courtesy, too, Mr. Whittaker. I hope you have a fine trip home.

The Clerk: The case is continued until July 18 for submission.

[Endorsed]: Filed September 7, 1949. [78]

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In the District Court of the United States for  
the Northern District of California, Southern  
Division

No. 27,299-H

THE AMERICAN INSURANCE COMPANY, et  
al., all corporations,

Plaintiffs,

vs.

PICKERING LUMBER CORPORATION, a cor-  
poration,

Defendant.

### DEPOSITION OF ANSON HERRICK

Be It Remembered, that on Thursday, the 28th  
day of August, 1947, at 9:30 o'clock a.m., pursuant



to Notice of Taking Deposition, at the offices of Messrs. Severson, Brown, Keough & McCallum, 605 Market Street, Room 1004, San Francisco, California, personally appeared before me, Louis Wiener, a Notary Public in and for the City and County of San Francisco, State of California,

ANSON HERRICK

a witness called on behalf of the defendant herein.

Messrs. Long & Levit, represented by Bert W. Levit, Esquire, and David C. Bogert, Esquire, appeared as attorneys for the plaintiffs; and Messrs. Severson, Brown, Keough & McCallum, represented by Harold Clinton Brown, Esquire, appeared as attorneys for the defendant. [1\*]

The said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the above-entitled cause, did thereupon depose and say as hereinafer set forth.

(The notary public administered the statutory oath to Anson Herrick.)

The Notary Public: And all of the usual stipulations, gentlemen? I may be excused?

Mr. Brown: Mr. Wiener, I think you had better stay here for just a little while. I think they are contemplating an objection at the outset, and if so you had better remain.

(Mr. Lewis Lilly enters deposition room.)

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\* Page numbering appearing at top of page of original Reporter's Transcript.

Mr. Brown: Mr. Lilly, you might be sworn at this time, and then you will be excused.

The Notary Public: May I have your name?

Mr. Lilly: Lewis Lilly.

The Notary Public: And your address?

Mr. Lilly: 444 California Street.

(The notary public administered the statutory oath to Lewis Lilly.)

Mr. Brown: Now you may be excused until further notice, Mr. Lilly. [2]

### ANSON HERRICK

a witness called on behalf of the defendant, being first duly cautioned and sworn by the notary public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

#### Examination

By Mr. Brown:

Q. What is your full name, please?

A. Anson Herrick.

Q. What is your address?

A. 465 California Street.

Q. With what firm or firms are you associated, and in what business are you engaged, or what profession?

A. I am in the profession of public accountancy, senior partner of the firm of Lester, Herrick and Herrick.

Q. How long have you been so engaged in that profession or business?

(Deposition of Anson Herrick.)

A. Must I answer that? Too long. Forty years.

Q. Now, you were one of the appraisers in the claim of the Pickering Lumber Corporation on its policies of insurance covering business interruption losses due to a fire that occurred at the Pickering Lumber Corporation's plant at Standard, California, on or about July 7th, 1945, which was the date of the fire, is that correct? A. I was.

Q. And you were appointed as such appraiser by the Pickering Lumber Corporation?

A. That is correct.

Q. And Mr. Frank J. Maloney was appointed as the other appraiser, is that correct?

A. That is right. [3]

Q. And between the two of you, and pursuant to the terms of the policies of insurance in this case, you selected an umpire, did you not?

A. That is right.

Q. And you selected whom?

A. Mr. Lewis Lilly.

Q. Before entering upon your duties as an appraiser in this case, you read the policy provisions relative to your appraisal duties, is that correct?

A. That is right.

Q. And other pertinent provisions of the policy?

A. That is right.

Q. You are familiar with this clause of the insurance policy—and I am reading from Exhibit "A," page 3 of the plaintiffs' complaint on file

(Deposition of Anson Herrick.)

herein, which is a portion of one of the insurance policies of one of the insurance companies in this case, which states as follows:

“If the insured and this company fail to agree, in whole or in part, as to the amount of loss, within ten days after such notification, this company shall forthwith demand in writing an appraisement of the loss or part of loss as to which there is a disagreement, and shall name a competent and disinterested appraiser, and the insured, within five days after receipt of such demand and name, shall appoint a competent and disinterested appraiser, and notify the company thereof in writing, and the two so chosen shall, before commencing the appraisement, select a competent and disinterested umpire.

“The appraisers together shall estimate and appraise [4] the loss or part of loss as to which there is a disagreement, stating separately the sound value and damage, and if they fail to agree they shall submit their differences to the umpire, and the award in writing duly verified of any two shall determine the amount or amounts of such loss.”

You were familiar with that clause in the policy?

A. I was.

Q. And you were at the time of this appraisement and after your appointment, is that correct?

A. That is correct.

Q. Have you the date of the first hearing that you held?

(Deposition of Anson Herrick.)

A. March 26th, 1947, commencing at 10:00 o'clock in the morning.

Q. And who was present at that hearing?

A. Myself, Mr. Maloney and Mr. Lilly, as appraisers and umpire; Mr. Frank Momyer, secretary and treasurer of the Pickering Lumber Corporation; Ben Johnson, chairman of the board of directors of the Pickering Lumber Corporation; Paul Barnett, of the firm of Watson, Ess, Barnett, Whitaker & Marshall, 15th floor Dierks Building, Kansas City 6, Missouri, attorney for the Pickering Lumber Corporation; George Herrington, associated attorney with Paul Barnett; W. H. Thomas, of the firm of Thomas & Jackson, Portland, Oregon, a forest engineer; Walter S. Kennon, Standard, California, sales manager Pickering Lumber Corporation; J. C. Lucas, certified public accountant, with the firm of Robinson, Nowell & Company, independent accountants for the Pickering Lumber Corporation; [5] Kenneth W. Withers and Wilfred N. Ball, representing Fire Companies' Adjustment Bureau, Inc., 315 Montgomery Street; Frank Baker, public accountant, engaged by the insurers; Curt F. Setzer, witness for Pickering Lumber Corporation; he is a box factory operator; Mr. Lee Moffett, witness for Pickering Lumber Corporation; he is connected with the Western Pine Association.

Q. How many hearings did you have on this matter?

A. The hearing on March 26th adjourned at



(Deposition of Anson Herrick.)

noon, reconvened at 2:00 o'clock, and continued until approximately 4:00 o'clock; reconvened at 9:00 a.m. on March 27th, continued until noon, reconvened at 2:00 o'clock or thereabouts, and continued until about 4:00 in the afternoon.

Q. Now, at the outset of this deposition, besides reading the provisions of the insurance policy, particularly the clause that I mentioned to you, a Mr. Withers you mentioned was present—is that correct?

A. That is correct. By the way, you said at the beginning of this deposition. I think you meant at the beginning of this hearing.

Mr. Brown: That is correct. Will you make that correction, Mr. Reporter.

Mr. Levit: Will you read that back to me, Mr. Hart?

(Record read.)

Q. (By Mr. Brown): Now, Mr. Withers at that time gave some further instructions to the effect that you need not necessarily [6] confine yourself to the information obtained at this hearing, but you could also inform yourselves in any legitimate manner and from any legitimate source that you saw fit, is that correct?

Mr. Levit: Just a minute, Mr. Herrick. I object to the question on the ground it is leading and suggestive.

Mr. Brown: You may answer the question.

(Deposition of Anson Herrick.)

A. I recall no such statement by him at the hearing.

Q. Were there any additional instructions given you at the outset of that hearing, or at any time during the hearing, relative to your duties as such appraisers?

Mr. Levit: By whom?

Q. (By Mr. Brown): By any of the representatives of either the Pickering Lumber Corporation or by the representatives of the insurance companies? A. None.

Q. None?

A. I might interject that I had a letter from Mr. Withers, and I believe copies of that were furnished to the others involved.

Q. Could we have the date of that letter, if you have it in your files that you are looking through?

A. I am trying to find it. Just a minute. It is a letter dated April 4th, 1947, to the appraisers, filed by Kenneth W. Withers on behalf of the insurers. That letter, by the way, was referred to in the award.

Q. It was referred to in the award by the appraisers? A. Yes. [7]

Q. Does it indicate in your files, or that copy of the letter that you have in your files, that copies were furnished to the Pickering Lumber Corporation and to the plaintiff insurance companies?

A. No, but the letter that I received was a carbon copy. It was addressed to Mr. Maloney and to me.

(Deposition of Anson Herrick.)

Q. Have you an extra copy of that letter in your files?           A. No.

Q. May we have that letter, please, so we may have it marked in evidence as an exhibit?

A. Well, I dislike very much taking it out of my file. I will be very happy to have a copy made for you.

Mr. Brown: That will be satisfactory. If you will have a copy made, and furnish it to Mr. Hart so he may include it as an exhibit in this deposition, if that is satisfactory to you, Mr. Levit.

Mr. Levit: Yes, it is.

Mr. Brown: I will ask that be marked as "Defendant's Exhibit No. 1."

Mr. Levit: Of course, it will be understood that by failing to object to the attachment of the letter to the deposition we do not concede its materiality or relevancy. As a matter of fact, I haven't yet seen the letter, but we have no objection to it being attached to the deposition if it was furnished to the appraisers in the appraisal as Mr. Herrick testified. [8]

The Witness: What exhibit will that be?

Mr. Brown: "Defendant's Exhibit No. 1."

(Said letter marked "Defendant's Exhibit No. 1.")

Q. (By Mr. Brown): Now, in arriving at your findings of fact and your award you did not confine yourself to the testimony produced at that hearing, did you?           A. No.

(Deposition of Anson Herrick.)

Q. You did not swear any witnesses at the hearing, did you?      A. No.

Q. And you didn't serve any subpoenas——  
A. No.

Q. (Continuing): ——on witnesses to appear?  
A. No.

Q. Did you have any books of the Pickering Lumber Corporation in your hands at the time of this hearing?      A. No.

Q. Did you at any time examine those books?  
A. No.

Q. You did have the document entitled "Final Proofs of Loss of the Pickering Lumber Corporation," did you not?

A. That is correct. In addition to which the appraisers obtained copies of the annual reports prepared by their independent accountants for several years.

Q. And those were at the hearing and before yourself and the other appraisers at the time of the hearing, is that correct?

A. No, they were obtained after the hearing.

Q. They were obtained after the hearing?

A. Yes.

Q. And you examined those documents in arriving at your award?

A. They were examined to the extent that we considered the information pertinent.

Q. Yes. And the pertinent information therein,

(Deposition of Anson Herrick.)

you used [9] the information in analyzing the claim and finally arriving at your award?

A. To a limited extent. The extent was limited because of the detail of the matter of the claim which had been presented.

Mr. Brown: Yes.

Mr. Levit: I didn't hear that last, Mr. Reporter. Will you read it?

(Record read.)

The Witness: Well, it should be, the detail with which the claim had been presented.

Q. (By Mr. Brown): Now, you did arrive at an award, did you not—finding and award?

A. We did.

Q. And those findings and award were dated May 1st, 1947? A. Yes.

Q. I will show you what purports to be a copy of those findings and award, and ask you if the one I am showing you is a correct copy of that?

A. Well, without checking it word for word, I would say that it was.

Q. It appears to be a carbon copy.

A. No, it isn't a carbon copy. It is a carbon copy of a retyping of the original award.

Mr. Brown: Subject to that being checked, rather than doing it now, supposing we stipulate that it is a correct copy. It is the one that was forwarded to us by the company.

Mr. Levit: Well, I wouldn't have any way of knowing. As a matter of fact, I don't think that



(Deposition of Anson Herrick.)

for the purpose of the [10] deposition there is any need of attaching a copy of that kind to the deposition because there are photostatic copies of the award itself available, and I am sure you either have them or I can furnish them to you, or your client can furnish them to you, and we can produce them at the time of the trial.

Mr. Brown: I will withdraw the statement.

Q. In your award and findings as set forth in that award of May 1st, 1947, and as signed by yourself, Mr. Maloney and Mr. Lilly, you arrived at certain sums as set forth there—total sums—is that correct?      A. That is correct.

Q. Now, did you prepare any memorandum of the detail making up those sums?      A. Yes.

Mr. Levit: Well, I object to the question on the ground that it is entirely irrelevant and immaterial; pertinent to no issue in the case as to what memorandum Mr. Herrick or any other appraisers or any umpire prepared preliminarily to making up the award.

Mr. Brown: What is your answer?

A. Yes.

Mr. Levit: May I request, Mr. Brown, that you clarify the question to the extent of determining whether the “you” to which you refer in the question refers to Mr. Herrick or refers to the appraisers and umpire as a group?

Mr. Brown: I will.

Q. When I refer to “you” in these proceedings,

(Deposition of Anson Herrick.)

I am referring to yourself and the other appraiser.

Mr. Levit: Acting jointly?

Mr. Brown: Acting jointly. And to make the question clear, I will reframe it and ask you if you and Mr. Maloney prepared any detail in arriving at the final sum totals of your award.

Mr. Levit: Just a moment. I object to the question as unintelligible and contradictory. At the outset, Mr. Brown, you said you were referring to the two appraisers and the umpire, and then in the latter part of your question you said you were referring to only the two appraisers; furthermore, the question is unintelligible because it isn't clear from the question as to whether you mean each of them did prepare such memorandum, so that the answer "Yes" would mean that they all did it, but each of them did it on his own, or whether you mean any such document as you refer to, or memorandum, was prepared by them jointly as a board.

Mr. Brown: Let me ask you, Mr. Herrick, is the question clear to you, or is it not?

The Witness: It is a question that could either be answered "Yes" or "No."

Mr. Brown: Let me put it this way, then:

Q. Did you jointly as a board prepare any memorandum making up the detail of these final totals that you have submitted in your award of May 1st, 1947?

Mr. Levit: To which we object on the ground that it is irrelevant and immaterial; also on the

(Deposition of Anson Herrick.)

ground it is unintelligible, [12] because it says, as I recall the question—pardon me. Will you read the question again, Mr. Hart. I was a little confused by the form of it.

(Pending question read.)

Mr. Levit: I will confine my objection, then, to the point that it is irrelevant and immaterial.

Mr. Brown: Will you answer the question?

A. At the conclusion of the consideration by the appraisers and the umpire various bases were determined upon as acceptable, and upon the bases of those determinations I individually prepared a statement computing the loss, and that statement was considered by Mr. Maloney and Mr. Lilly, and became a statement which I think it is fair to say was the joint statement of the appraisers and the umpire.

Q. Have you that statement with you?

A. Yes.

Mr. Brown: May we have it, please, and to be marked as defendant's exhibit next in order.

A. Well——

Mr. Levit: Before making my objection to the production and the introduction of this statement, I would like, if you will permit me, Mr. Brown, to ask the witness a few questions concerning it.

Mr. Brown: Certainly.

Q. (By Mr. Levit): Mr. Herrick, you said that various bases were determined upon as acceptable.

(Deposition of Anson Herrick.)

By the word "acceptable" I take it you mean acceptable to the appraisers and the umpire? [13]

A. Of course.

Q. Would it be fair to say what you meant by "acceptable" was proper so far as your determination was concerned?

A. Proper; and I should have said accepted rather than acceptable.

Q. By the appraisers?

A. By the appraisers.

Q. And the umpire?

A. And the umpire, yes.

Q. I would like to ask you, Mr. Herrick, whether you ever furnished copies of that statement to anyone other than the other appraiser and the umpire?

A. I did not.

Mr. Levit: We now object to the production of this document on the ground that it is wholly incompetent, irrelevant and immaterial to any issue in the case; on the ground that it is a mere process in the determination by the appraisers of the award which they ultimately made, and therefore is incompetent as evidence, and has no bearing upon any of the issues of the case.

Q. (By Mr. Brown): Mr. Herrick, will you produce the document so that we might mark it in evidence as "Defendant's Exhibit No. 2"?

A. Again, I will say that I will give you a copy of that.

Q. Let me ask you this: The document as you

(Deposition of Anson Herrick.)

have it now is in the same form as when it was agreed on by the other appraiser, is that correct?

A. Yes.

Q. And the umpire? A. Certainly.

Q. In other words, there have been no changes of that form? [14]

A. Yes and no. The draft as originally typed had adopted a certain footage which was subsequently found to be in error, and the original typing was changed in pencil without being retyped.

Q. (By Mr. Levit): Was that change made before the final award was made?

A. Oh, certainly.

Q. (By Mr. Brown): There were no changes made on it before anything of that sort?

A. No.

Mr. Levit: I further object on the ground that this document is in no way binding upon the plaintiffs in this case. Now, at this time, Mr. Brown, I would like to state——

Mr. Brown: May I interrupt for just one second before you do that. I think this objection of yours will pertain to this next statement I am going to make.

In regard to that document, Mr. Herrick, I must insist that that one in particular be taken from your files, and incorporated here, and we will make a photostatic copy and give it back to you.

The Witness: Well, I will make the photostatic copy.



(Deposition of Anson Herrick.)

Mr. Brown: Then, Mr. Reporter, will you instruct the witness to produce the document and deliver it to us—I mean Mr. Notary.

The Notary Public: You will please——

Mr. Levit: Just a moment before you do that.

The Notary Public: Pardon me.

Mr. Levit: I would like to say, Mr. Brown, that we intend, [15] in the event that you propose to go into the mental processes and deliberations and memoranda of the appraisers that led up to the making of this award, we are going to ask, and we are going to demand, under the provisions of Rule 30d, that the taking of the deposition be suspended for a sufficient time to enable us to make a motion to the court for an order terminating or limiting the scope of this examination. In order not to be unduly technical, and not to cause us to go back and forth on the thing, I will make my objection a little fuller. I will say we have no objection whatever to the witness being asked and testifying as to any matters that have to do with the hearings which were held before the appraisers; I have no objection to the witness testifying as to what matters were considered by the appraisers; I have no objection to his producing, and to your attaching to the deposition, any documents that were furnished by either of the parties, or that the appraisers obtained on their own from outside sources and considered in the determination of this appraisal; but I will, as I say, in connection with this matter, that

(Deposition of Anson Herrick.)

in the event you propose to go into the deliberations of the appraisers themselves—the appraisers and the umpire themselves—or to ask them to produce, or to attach to the deposition, or to give you an examination of any memoranda which they made in the course of their deliberations for their own purposes as a part of their own process in arriving at this award, that we will not only object, but as I say, we will demand that the [16] deposition be suspended in order to enable us to take the matter before the court by motion under Rule 30d of the Federal Rules of Civil Procedure; therefore, I suggest that if you intend to inquire into those matters which are not within the scope of my objection that you pass this matter for the time, and complete those other matters; and then perhaps, if you wish, or not, just as you like, you can give us an opportunity to cross-examine on those matters, and then come to these other matters after that, so we won't have to do this in too much of a piecemeal manner.

Mr. Brown: Will you read the last question that I asked, Mr. Reporter?

Mr. Levit: Well, you asked the notary to instruct the witness to deliver to the reporter the particular memorandum to which he referred. And as I say, I would request that you postpone that demand until we complete the matters which both of us agree that you have a perfect right to inquire into on the deposition.

(Deposition of Anson Herrick.)

Mr. Brown: Well, Mr. Levit, I do not know what your specific objection is to this question. You have stated that you were going to object if I did certain things—if I contemplated doing certain things here. Now, you are objecting to the introduction of this particular document which, as I understand it, is a compilation of figures of the items in detail making up the final award—is that correct?

Mr. Levit: This particular document, as testified, was a [17] memorandum prepared by Mr. Herrick, which he submitted to the other two appraisers, showing the breakdown or detail upon which the final award was arrived at. He testified that it was subsequently changed by reason of an error in the computation that they found in it; that the other appraisers, after all of their deliberations were concluded, ultimately and before arriving at the award, agreed to it; and that no copies of it were ever furnished to anyone other than, as stated, to the other appraisers and to the umpire.

The Witness: May I interject?

Mr. Levit: Yes.

The Witness: I am not certain that I furnished copies of that to either Mr. Maloney or to Mr. Lilly.

Q. (By Mr. Brown): They did read it?

A. Oh, yes.

Q. And study it, and knew the items, and were in accord and in agreement with all of those items, is that correct? A. Completely so.

(Deposition of Anson Herrick.)

Mr. Brown: Well, Mr. Levit, I might say this: At this time I am going to request that the document be used as our exhibit, and marked as an exhibit, and that the notary instruct the witness to turn that document over to me so that it may be marked by the reporter.

Mr. Levit: If you insist upon it at this time, then——

Mr. Brown: I might say this, rather than to pursue that, I might ask a few further questions that might eliminate your motion that I feel you are in the act of making. [18]

Q. Would you read the items of that detail?

Mr. Levit: Well, I make the same objection, obviously, to the reading of the items; and would ask permission at this time also, now that the witness has testified further, to ask him another question or two concerning this document.

Q. Mr. Herrick, obviously, in order to arrive at the final award which was ultimately signed, it was necessary for the appraisers to come to conclusions on numerous details, was it not?

A. That is correct.

Q. And this particular document that you refer to was in the nature of a memorandum which you prepared after many of the deliberations had taken place, isn't that so?

A. That is correct; after all of the deliberations had taken place.

Q. Yes. And it was used by you and the other

(Deposition of Anson Herrick.)

appraisers merely as one of the steps in the process of making up your minds in arriving at the figures shown on the final award, is that correct?

A. That is correct.

Mr. Levit: As I say, Mr. Brown, if you insist upon the production and the attachment to the deposition of the document at this time, then I will make my demand for suspension of the deposition at this time, so that matter will be entirely in your control. If, on the other hand, you will pass this until you have completed the examination on those matters that we both agree are entirely relevant and material and proper to be inquired into, why, we can continue the deposition, and then [19] you can come to this again later.

Mr. Brown: Well, I will pass the question for the moment, and make the request later.

Q. I might ask relative to that memorandum, that is the only memorandum that was prepared, as I understand it?     A. That is correct.

Q. And that comprises the details and breakdown of the figures and the totals which were ultimately arrived at in your award, is that correct?

A. It is a summarization of certain figures—of all of the figures that entered into the computation, but it doesn't contain all of the detail making up many of those figures.

Mr. Levit: Will you read that answer back to me, Mr. Hart?

(Witness' answer read.)



(Deposition of Anson Herrick.)

Mr. Levit: Was that the last question you had directed to that particular document?

Mr. Brown: Yes.

Mr. Levit: Then I would like to ask a question at this point.

Q. You don't mean, Mr. Herrick, that during the entire course of this appraisal you did not prepare any other memoranda concerning the award or concerning the appraisal itself and the figures, do you?

A. I prepared many memoranda on various bases, but this is the only statement which was prepared after the appraisers and the umpire had reached a final agreement. [20]

Q. Yes. And you have no way of knowing how many or what memorandums during the course of your deliberations may have been prepared by the other appraisers or the umpire for their own use, have you?

A. I know that they made certain memoranda, but the extent to which they did I am uninformed.

Mr. Levit: Yes.

Q. (By Mr. Brown): And, Mr. Herrick, you have stated that various bases were determined upon in computing this loss and which were acceptable to the other appraiser and the umpire.

Mr. Levit: Well, now, I object to the question, Mr. Brown. I think you are mistaken there. I think the witness testified that various bases were con-

(Deposition of Anson Herrick.)

sidered. Instead of "considered," make that "determined upon."

Q. (By Mr. Brown): They were both considered and determined upon in arriving at this loss?

A. Many bases were considered; certain bases were finally accepted.

Q. On these bases that were finally considered, did you prepare any written memorandum pertaining to them?

Mr. Levit: Let the record show that we object on the same grounds, that it is entirely immaterial whether the appraisers or Mr. Herrick prepared any memorandum or memoranda whatever.

Mr. Brown: Will you answer the question?

Mr. Levit: The question is preliminary, so I won't insist at the moment on a suspension of the deposition, but I want to [21] reiterate our objection to it.

A. I prepared several memoranda as the considerations progressed. I doubt that any of those memoranda by themselves contained or summarized all of the considerations.

Q. (By Mr. Brown): Have you all of those written memoranda with you today?

A. Yes.

Q. How many are there?

Mr. Levit: The same objection.

Mr. Brown: This is off the record.

(Off record.)

(Deposition of Anson Herrick.)

Mr. Brown: What was the last question?

(Question read.)

Mr. Levit: And you have my objection, Mr. Reporter?

The Reporter: Yes.

Mr. Brown: We will pass that for a moment.

Q. Now, you are familiar with this document, as you have stated, entitled "Final Proofs of Loss of the Pickering Lumber Corporation," are you not?

A. I am.

Q. I show you schedule 1, page 2, of those Proofs of Loss, and point out particularly an item entitled "Production prevented, 39,816,770 feet at 6.68667; and after that figure there is the total sum of \$266,241.60. What figure did you arrive at for the production prevented?

Mr. Levit: Now, just a moment, Mr. Herrick.

The same objection goes to this question, and for the same reason. There is absolutely no occasion to inquire into the [22] figures that the appraisers used in finally arriving at their final conclusions; and I again repeat, Mr. Brown, that I am perfectly willing to continue the deposition if you can keep off for the moment the appraisers deliberations and the interim decisions that they arrived at prior to the making of the award. As I say, I don't have any objection——

Mr. Brown: Mr. Levit, just so that we understand ourselves here. You are objecting to the ques-

(Deposition of Anson Herrick.)

tioning of this witness on any item, or the amount of it, in arriving at the final award as set forth in this findings and award of the appraisers dated May 1st, 1946, is that correct?

Mr. Levit: Will you read that back to me, please?

(Record read.)

Mr. Levit: That is correct. You understand that I am not at all objecting to the appraisal, or to this witness testifying as to what items they took into consideration. I am objecting to any of the reasons that the appraisers had or arrived at for making these final figures unless those reasons go to a question that tends to show either a violation of the scope of the submission, or the matter of fraud. The process by which they arrived at the final award is wholly irrelevant to the question, and that is the basis of the objection. I think I stated it rather fully some time back.

Mr. Brown: I will ask the question. Will you read the first question I asked on this subject matter of this witness that was objected to, Mr. Reporter? [23]

(Pending question read.)

Mr. Levit: Now, I want to make the further objection to the question that the word "you" again is ambiguous. It is unclear whether it refers to the witness or whether it refers to the witness and the other appraiser, or whether it refers to the witness

(Deposition of Anson Herrick.)

and the other appraiser and the umpire acting jointly.

Mr. Brown: I will correct the question in that regard.

Q. What amount did you and the other appraiser and the umpire arrive at for "production prevented"——

Mr. Levit: Now, do I understand, Mr. Brown, that you intend——

Mr. Brown: Just one second. I want to finish that question.

Mr. Levit: Oh, pardon me.

Mr. Brown: (Continuing): ——for the loss period?

Mr. Levit: Do I understand, Mr. Brown, that you intend now to pursue the matters to which I have objected a good many times.

Mr. Brown: It is my intention to question this witness on the various items making up the total awards that are set forth in the award and other findings of the appraisers and umpire.

Mr. Levit: Now, bear in mind that I haven't the slightest objection to your asking the witness so far as the items that go to make up the total award are concerned, or what items they [24] took into consideration, or what evidence was produced before them on any of those items, or what evidence they obtained from other sources on any of those items, but that I do object, as I say, to the witness giving the process of items, or otherwise, or the



(Deposition of Anson Herrick.)

reasons for the particular amount that they arrived at.

Mr. Brown: You understand that I am not asking for any of the mental processes in making up this particular item. I am asking merely for the item itself.

Mr. Levit: I understand that, and my objection goes to that, but the award speaks for itself; and as to what the appraisers in dollars and cents included in making up their final figure, or what they didn't include, is wholly beyond the relevancy to any of the issues in this case; and I again repeat, if you do have questions that don't relate to this line of objection, we can get those out of the way; otherwise, as I say, if you insist upon an answer to this question, then before the witness answers the question I wish to demand a suspension of the deposition.

Mr. Brown: Let me reframe the question.

Q. In your award of May 1st, 1947, you have set forth in paragraph No. 1 the following language: "The net profits prevented and fixed charges and continuing expenses during the period July 8th, 1945, to April 7th, 1946, reduced by profits realized and fixed charges and continuing expenses by partial operation following the fire, amounted to \$581,000.00." [25]

That is an item in your award, is it not?

A. That is correct.

Q. Will you tell us the detail making up that

(Deposition of Anson Herrick.)

item, particularly, and first, what figure you and the other appraiser and the umpire arrived at in finding the net profits prevented?

Mr. Levit: To which I object on the grounds already fully stated; and at this time, Mr. Reporter and Mr. Notary, I demand that the taking of this deposition be suspended for a period which presumably Mr. Brown and I can agree upon; at any rate, for the time necessary to make a motion for an order under Rule 30d of the Federal Rules of Civil Procedure on the grounds already stated; and that the examination is being conducted in bad faith, and in such manner as to annoy, embarrass and oppress the plaintiffs in this case; and I am going to ask the court to limit the scope and manner of taking the deposition, or, in the alternative, to order that the notary cease forthwith from taking the deposition.

Can we agree on a time now, Mr. Brown?

Mr. Brown: I suggest the deposition be continued to a date that is convenient.

Mr. Levit: I would say this, that we must have, in order to go before the court, a transcript of the testimony thus far, and if Mr. Hart will tell us when that transcript will be available, I can say when I think we can take it before the court.

The Reporter: Next Tuesday. [26]

The Witness: Can't we make it after the 9th?

Mr. Levit: You say the transcript will be ready next Tuesday?

(Deposition of Anson Herrick.)

The Reporter: Yes.

Mr. Levit: Well, then, we suggest that the deposition be continued to some mutually agreeable date after September 8th so we can present the matter to the court on its law and motion date on September 8th.

What date would be agreeable to you, Mr. Brown?

Mr. Brown: Mr. Herrick is going to be out of town until the 9th.

The Witness: The 9th is a holiday.

Mr. Brown: Let us make it on the 10th or the 11th, whichever is convenient.

The Witness: Well, frankly, if you can make it the 11th, that would be better, because the 10th will be the first day I will be back.

Mr. Levit: Then we will ask the notary to order that the deposition be suspended pending further order of the court, and until at least 9:30 a.m., at the same place, on September 11th, 1947, subject to whatever order the court may make upon that presentation.

The Notary Public: It is so ordered. [27]

(Deposition of Anson Herrick.)

Offices of Messrs. Severson, Brown, Keough &  
McCallum, Room 1004, 605 Market Street, San  
Francisco, California,

Wednesday, March 3rd, 1948,  
10:00 o'clock A.M.

Pursuant to adjournment, the deposition of the  
witness

ANSON HERRICK

at the above time and place was resumed.

Present: Bert W. Levit, Esquire, representing  
Messrs. Long & Levit, attorneys for the  
plaintiffs.

Harold Clinton Brown, Esquire, repre-  
senting Messrs. Severson, Brown,  
Keough & McCallum, and Paul Barnett,  
Esquire, representing Messrs. Watson,  
Ess, Barnett, Whittaker & Marshall,  
attorneys for the defendant.

Harold H. Hart, shorthand reporter.

(Unreported discussion.)

Mr. Levit: May I suggest that we start with the  
stipulation that the notary may be excused, subject  
to recall at the request of either party, if desired.

Mr. Barnett: It is so stipulated. Isn't that  
right?

Mr. Brown: Yes. It is stipulated that the wit-

(Deposition of Anson Herrick.)

ness has already been sworn, and is under oath at present. [28]

ANSON HERRICK

recalled as a witness on behalf of the defendant, having been previously duly cautioned and sworn by the notary public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

By Mr. Barnett:

Q. I will show you, Mr. Herrick, a proof of claim that is printed, and I will ask you if that is a true copy of the proof of claim which was turned over to you by the parties as having been filed by the Pickering Lumber Corporation with the insurance company?

Mr. Levit: May I request a clarification of what you mean by "the parties"? You mean both the insured and the insurer?

Mr. Barnett: Yes.

Mr. Levit: I will have no objection to the question, because it is preliminary, but before any further questions are asked, I want to interpose an objection.

A. I received a printed proof of loss which I presume this is a true copy of.

Q. (By Mr. Barnett): Who delivered it to you?      A. Frankly, I have forgotten.

Q. This proof of loss undoubtedly was sent to you after your appointment, I take it?



(Deposition of Anson Herrick.)

A. I think it was Mr. Herrington who at that time was cooperating with you. [29]

Mr. Levit: Mr. Herrington of the firm of Orrick, Dahlquist, and so forth? A. Yes.

Mr. Barnett: Who at that time was acting as legal counsel for the Pickering Lumber Corporation.

I will ask that it be marked as an exhibit, and made a part of the deposition.

(Printed copy of document headed "Pickering Lumber Corporation, Final Proof of Loss," marked "Defendant's Exhibit 2.")

Q. (By Mr. Barnett): You did in fact hold hearings, did you not? A. Yes.

Q. You did not swear any witnesses?

A. No.

Q. You took their statements unsworn?

A. That is correct.

Q. Do you remember who appeared before you as witnesses?

A. I had better refer to my record.

Q. If you have one, that would be better.

A. The following appeared: Frank Momyer—

Mr. Levit: Before the witness testifies, I would like to see the record that he is referring to in giving this testimony.

A. I am testifying from the notes relating to the hearing of the matter by the appraisers, the matter being "In re Pickering Lumber Corporation Business Interruption Loss Insurance Claim."

(Deposition of Anson Herrick.)

Q. (By Mr. Levit): Who prepared those notes, Mr. Herrick? [30]

A. I prepared those notes.

Q. Approximately when?

A. By dictation immediately after the hearing, and from my original pencil notes.

Q. Do you also have in your files your original pencil notes? A. Yes, right here.

Q. (By Mr. Barnett): By refreshing your memory, can you tell me what witnesses appeared before the appraisers?

A. Yes. Frank Momyer, secretary-treasurer, Pickering Lumber Corporation; Ben Johnson, chairman of the board of directors of Pickering Lumber Corporation; Paul Barnett, of Watson, Ess, Barnett, Whittaker & Marshall.

Q. (By Mr. Levit): That is the gentleman who is taking this deposition, is it not?

A. Right. Counsel for Pickering Lumber Corporation. George Herrington, associated attorney with Paul Barnett; W. H. Thomas, of Thomas and Jackson, Portland, Oregon, forest engineer; Walter——

Q. (By Mr. Levit): Whom did he represent, if you know?

A. He was a witness on behalf of Pickering.

Mr. Levit: Pardon me. This is off the record.

(Unreported discussion.)

The Witness: A. Walter S. Kennon, sales manager of Pickering Lumber Corporation; J. C.

(Deposition of Anson Herrick.)

Lucas, of the firm of Robinson, Nowell & Co., certified public accountants, accountants for Pickering Lumber Corporation; Kenneth W. Withers, of Fire Companies' Adjustment Bureau, Inc.; Wilfred Ball. [31]

Q. (By Mr. Barnett): Appearing for whom?

A. Appearing for the insurers.

Q. Yes.

A. Wilfred N. Ball, Fire Companies' Adjustment Bureau, Inc., also appearing for the insurers; Frank Baker, public accountant, appearing for the insurers; Curt F. Setzer, box factory operator, and a witness for Pickering; and Mr. Lee Moffett of Western Pine Association, a witness for Pickering.

Q. I notice that you included as those that appeared Paul Barnett. That is I?

A. That's right.

Q. I was asking about witnesses. Is it your recollection that I gave evidence, or did you put it down on the theory of witnesses that weren't sworn and that made statements?

A. No, I don't think you gave evidence. You interrogated the witnesses for the Pickering Lumber Corporation.

Q. But I did appear?

A. You did appear.

Q. Did you or did you not require the production of Pickering Lumber Company's books and records at that hearing?

A. No.

(Deposition of Anson Herrick.)

Q. You depended, not on the way they were handled but on the actual amounts—the amounts reported in the Pickering Lumber Company's proof of claim as testified to by its accountant and its treasurer, is that right?

A. We took into consideration the proof of claim, the computation made by Mr. Baker appearing for the insurers, and also had reference to the examination reports of Nowell, [32] Robinson & Co., and various other data relating to sales and production variously obtained either from Mr. Baker or from the Pickering Lumber Corporation.

Q. Then after the hearing was over, did you decide that you needed further information?

A. Yes.

Q. And called for it? A. Yes.

Q. From different sources?

A. We requested additional information from the Pickering Lumber Corporation, and from their accountants, Nowell, Robinson. I think that was all.

Q. The other appraiser told you that he had consulted with other accountants about it?

A. During the progress of the consideration by him, yes.

Q. I mean after the hearing? A. Yes.

Q. But what I was getting at is this: In addition to the proof—not in the way that it has been handled, but to the extent that the figures showed in the proof of claim, those were the same figures

(Deposition of Anson Herrick.)

that were used by the accountants for the insurance companies, were they not?

A. I think that should be answered "yes." He used almost throughout either the figures shown by the proof of loss, or if those figures were subject to certain designated modifications.

Q. But the modifications were not on the theory that anything had been falsely put down on the books? A. No, no.

Mr. Levit: Just a moment. At this point I am going to [33] interpose a partial objection, or perhaps a suggestion, that inasmuch as this deposition is being taken by the defendant, and the witness is a witness for the defendant, I am going to object to each——

Mr. Barnett: Any leading question?

Mr. Levit: To any questions of that type or of any other type.

Mr. Barnett: I will try to remember. When you are on ground that you assume there is no controversy about, it is hard to remember that technical distinction; but I will try to keep it in mind.

Mr. Levit: I didn't mean to be critical, sir.

Mr. Barnett: No, no, I know you didn't.

Q. What was the name of the accountant that appeared for the insurance companies?

A. Frank Baker.

Q. And he also filed a statement showing what the claim of loss was? A. Yes.

Q. You might say a counterpart of the Picker-



(Deposition of Anson Herrick.)

ing's proof of claim, but coming to a different conclusion. A. You can't say a counterpart.

Q. Well, I mean serving the same function.

A. He used the data shown by the proof of loss, and with certain modifications of factors that entered into it, and by the adoption of different principles of allocation, came to a different result.

Q. He did not use any figures other than the way they [34] were handled, or whether they went in or whether they went out, than those which Pickering claimed were revealed by its book? I am now not talking about allocation; I am not now talking about the theory as to whether they should be included or not included; but he took the basic figures from which Pickering had made up its claim?

Mr. Levit: Just a moment, Mr. Herrick.

I object to that on the ground that it is leading and suggestive; and further on the ground that it calls for the conclusion of the witness.

Mr. Barnett: Well, he is an expert.

Mr. Levit: And asking for hearsay testimony.

Mr. Barnett: The testimony shows that he is an expert; and I want him to tell what the effect of that was.

Mr. Levit: I have in mind, of course, that he is qualified as an expert; and if the question related to any expert opinion of his, I wouldn't object to it on that ground. I don't think it does.

Mr. Barnett: I believe it does.

Q. What is your opinion on it, Mr. Herrick?

(Deposition of Anson Herrick.)

A. I have no recollection that he disputed any of the amounts as shown by the proof of loss.

Q. But he did——

A. With the possible exception—you might call it a dispute—the amount considered as the cost of depletion.

Q. The cost of what? [35]

A. Depletion. The stumpage.

Q. That's right. I had forgotten about that.

A. And that I don't think should really be called a dispute. It was merely the adoption of a different figure on a different theory.

Q. Did you understand that he disputed the basic facts from which Pickering had arrived at his figure of depletion?

Mr. Levit: I am going to make the same objection again, that it calls for the conclusion of the witness, as to what he understood. I have no objection to the witness testifying to any of the facts that occurred while this appraisal was going on; but for the witness to draw conclusions as to what he understood someone else to mean, I think that is——

Mr. Barnett: I think that is the ultimate question involved in this, the understanding of the appraisals which caused them to do what they did do; that is what we are trying to find out.

Q. If you can answer the question, please do so; and if not, all right.

A. No, I don't think I can answer the question.

(Deposition of Anson Herrick.)

Q. That is all right. Do you have the statement that was prepared by Mr. Baker—is that his name?

A. Yes.

Q. (Continuing): —Mr. Baker and filed with the appraisers? A. I have.

Q. May I have it, please? [36]

(Witness hands document to Mr. Barnett.)

Q. This is the original that was filed by him?

A. I don't know whether that is the original. In fact, I think it is a copy.

Q. Did you prepare the copy, or was it filed with you, or was there more than one?

A. Well, it was provided to me I think by Mr. Baker directly. I don't think there was any formal presentation of it on behalf of the insurers. It was given to me, I think, personally by Mr. Baker.

Q. He did that at the hearing, did he not?

A. I think it was at the hearing.

Q. I notice a lot of figures here in pencil. Were those figures on it when it was furnished by Mr. Baker? A. No.

Q. Who put those on there? A. I did.

Q. So those are your own notes that you made in trying to arrive at what you thought was the proper conclusions to arrive at in this case?

A. Well, those are a very few.

Q. I know. I don't claim that it is your accounting. I mean, you made them to aid you—as you came to something and wanted to remember what you thought about it, you made a note?

(Deposition of Anson Herrick.)

A. That's correct.

Mr. Barnett: I offer this Mr. Baker's statement in evidence. [37]

A. Well, now, that is from my records; and if you want that in evidence, I will have photostat copies made of it.

Mr. Barnett: Yes. I will offer it in evidence; but I will, if it is agreeable with you, have the stenographer make a photostatic copy to attach to the deposition, and return this one to Mr. Herrick. Do you agree to that?

Mr. Levit: Yes. I would like to look at those notes.

(Computations made by Mr. Baker marked "Defendant's Exhibit 3.")

(Unreported discussion.)

Mr. Levit: Let the record show that we will require on our copy of the deposition photostats of all exhibits, or copies of all exhibits, except as may be noted from time to time. We will not require a copy of Exhibit 2, as we already have a copy of that.

Mr. Barnett: Why can't we just tell him which we want at the end, or give him a list of what we want or don't want.

Mr. Levit: Yes.

Q. (By Mr. Barnett): Since I noticed that you have made notes on the statement prepared by

(Deposition of Anson Herrick.)

Mr. Baker, did you make any pencil notes on the proof of claim that was furnished to you?

A. Some, yes.

Q. Do you have the one that you made the notes on?

A. Yes, there are certain notes, Judge; but I think they would be largely unintelligible to anyone outside of myself; and many of them are of such a nature that probably I have [38] forgotten at the present time just why I made them.

I might say that the greater part of the notes are related to certain errors of inconsequential amounts which were pointed out by the witness, Mr. Momyer, at the hearing.

Q. In that connection, after the proof of claim was prepared and filed with the insurance company, and the appraisers were appointed, is it or is it not true that I put Mr. Momyer on the stand, and pointed out certain lump accounting expenses for telegrams, telephones, and things like that; and asked him to point out those that applied to trying to collect the insurance, and trying to tend to the Texas Oil, and trying to sell the Big Trees as a state park; and asked him how many of those applied to that? Do you remember that?

A. Yes, clearly.

Q. And that he pointed out a certain amount; and then there was an admission made by me that those ought not to have been included?

A. That's right. The corrected amount of those was something under a thousand dollars.



(Deposition of Anson Herrick.)

Q. Some seven hundred and something dollars?

A. Your memory is better than mine.

Q. Well——

A. Because that—that amount of some seven hundred dollars was in my mind, but I hesitated to state that because up to a thousand——

Q. I am not trying to pin you down. But after that had all been done by the accountants, it is true that I took up [39] the amount of the telegrams and telephones, and so forth, and asked them to go through, and to pick out every one, and the amount of it that applied to try to sell the Big Trees as a state park, and pertaining to the Louisiana Oil matter, and trying to collect the insurance. A. Yes.

Q. For the main part, are those the notes you have made on the proof of claim? A. Yes.

Q. Made at the time because they were in the nature of admissions that they had been incorrectly included? A. That's right.

Q. Is that about all the notes show?

A. I think that is about right.

Q. I don't want to put this in evidence if there is nothing to it. That is all I am going to do——

A. Frankly, yes. Let me assure you, Judge, that those very few notes relate to the matter just discussed—that is, the matter of incorrect conclusions, and are wholly immaterial.

Q. I will take your assurance. I just wanted

(Deposition of Anson Herrick.)

to see whether we would want to put that in as an exhibit. I don't think so.

After the hearings were over, did Pickering Lumber Company's lawyers file suggestions with your appraisers, setting out their claim and the theory of it?       A. Yes.

Q. Do you have it?

A. Yes, there was a brief filed on behalf of the Pickering Lumber Corporation by [40] Paul Barnett and George Herrington.

(Unreported discussion.)

Mr. Barnett: May I have the brief that was furnished to you?

Mr. Levit: Let me look at it before you ask any questions about it.

(Document handed by witness to Mr. Barnett.)

Mr. Barnett: I offer it in evidence. Now, Mr.——

A. I might call your attention to the fact that in this folder are not only the briefs but also a letter and a memorandum.

Mr. Levit: Could we have that, please?

A. (Continuing): ——filed by—a letter dated April 4th.

Mr. Levit: April 4th——

A. 1947.

Mr. Levit: From——

A. And an accompanying memorandum to the

(Deposition of Anson Herrick.)

appraisers from K. W. Withers of the Fire Companies' Adjustment Bureau.

Mr. Levit: To whom is the letter addressed?

A. To the appraisers, Maloney and Herrick.

Mr. Barnett: I think I know what it is, but let me see it. I was going to ask you that next, but since you have——

(Witness hands document to Mr. Barnett.)

Mr. Barnett: I offer in evidence the brief.

(Document entitled "Brief of Pickering Lumber Corporation" marked "Defendant's Exhibit 4.")

Q. (By Mr. Barnett): Mr. Herrick, you have called my attention [41] that in this file which you have handed me, in addition to the brief that I have just offered in evidence, is the original of a letter dated April 4th, 1947, addressed to Mr. Frank Maloney and Mr. Anson Herrick, who are the two appraisers, aren't they?

A. That is correct.

Q. Signed by Mr. K. W. Withers, executive general adjuster for the insurance companies. Is that not the same letter a copy of which was put in as Exhibit 1 when this deposition was first begun?

A. Yes, that is the letter.

Q. That is the same letter. It is understood that the original letter is offered in evidence, but that the copy may be attached and the original returned to Mr. Herrick.

(Deposition of Anson Herrick.)

Mr. Levit: What number is that, Mr. Hart?

The Reporter: Defendant's Exhibit 1.

Mr. Barnett: The brief is No. 4.

Q. Did Mr. Withers and Mr. Hall also file with you a written instrument which was entitled "Memorandum to Appraisers, Pickering Lumber Corporation Claim, Fire—July 7, 1945"?

A. Yes.

Q. And is this it?           A. That is it.

Q. And you are looking at it?

A. That is it.

Mr. Barnett: I offer that in evidence as Exhibit No. 5.

(Copy of document headed "Memorandum to Appraisers, Pickering Lumber Corporation Claim, Fire—July 7, 1945," marked "Defendant's Exhibit 5.")

Mr. Levit: I have a copy of that. [42]

Mr. Barnett: Yes, you have a copy of that.

Q. Within the time—not within the time as specified by the policy, but within the extended time agreed on by the parties by stipulation, did the—. It is true there was a stipulation extending the time?

A. There was a stipulation extending the time.

Q. But within the time so extended, did the appraisers make a report?           A. They did.

Q. Do you have that report?

A. Yes; or, rather, a copy of it.

Q. Look at that. I am going to give that to

(Deposition of Anson Herrick.)

the reporter if there is nothing wrong with it. If there is anything wrong with it, I am just as anxious to know as you are.

A. That is a copy.

Mr. Barnett: I offer it in evidence as Exhibit 6.

(Copy of letter on letterhead of Lester Herrick, and Herrick, dated May 2, 1947, signed Anson Herrick, and addressed to Pickering Lumber Corporation, together with attached "Award and Other Findings of the Appraisers," marked "Defendant's Exhibit 6.")

Q. (By Mr. Barnett): Mr. Herrick, at the time when we had this hearing set, and Mr. Levit was tied up in court and couldn't attend, at about that time——

Mr. Levit: What time are you talking about? What hearing?

Mr. Barnett: The hearing for this deposition. You remember that this deposition was continued on account of [43] objection and a motion; and then after that, why, there was a notice to take the deposition; and then it turned out that Mr. Levit was in court, and couldn't attend, and it was not set at that time.

A. I recall.

Q. You remember the occasion?

A. I remember.

Q. At or about that time, did you make an outline indicating the differences between what the appraisers allowed and what had been claimed by the Pickering Lumber Corporation?



(Deposition of Anson Herrick.)

A. I did.

Q. Do you have it?           A. Yes.

Q. May I have it, please?

Mr. Levit: What was the approximate date on which that was prepared, Mr. Herrick?

Mr. Barnett: That is as close as I can tell you. I was giving you the occasion, but I can't give you the date.

A. I could ascertain the exact date by referring to my letter file containing a copy of the accompanying letter; but this is an undated memorandum.

Mr. Levit: At any rate, it was after——

Mr. Barnett: It was after——

Mr. Levit: It was after the suit was filed, wasn't it?           A. Oh, yes.

Mr. Barnett: Oh, it was after the appraisers report.

A. It was within a month or six weeks after the report was furnished to you. [44]

Mr. Levit: I am just trying to fix the date. I know when it was.

Mr. Barnett: It was when we tried to resume this deposition after the motions had been made in court, but we couldn't get it up. May I see it, please?

(Unreported discussion.)

Mr. Barnett: I want to use it as an outline rather than to go through that great long claim.

Do you have a copy of this?

(Deposition of Anson Herrick.)

Mr. Brown: Yes, I have.

Mr. Barnett: Let me have it, will you please? I am going to return this to Mr. Herrick to refresh your memory. This is not anything that the appraisers as such prepared, is it?

A. No.

Q. It is a memorandum that you yourself prepared?

A. It is a memorandum that I prepared as a convenience to you and Mr. Brown for the purpose of developing the differences between the claim as made originally and the findings of the appraisers.

Q. (By Mr. Levit): At whose request was it prepared?

A. The request of Judge Barnett; and, if I recall correctly, Mr. Levit, with your consent.

Mr. Barnett: That was what I understood.

Mr. Levit: I would like to make it perfectly clear for the record that we have always contended and still contend that this approach is entirely irrelevant to any issue in [45] the case; and the analysis that Mr. Herrick made of the award or of the difference is incompetent, irrelevant and immaterial; and I propose to object to it. It is quite true that I offered no objection to Mr. Herrick complying with your request to prepare this schedule of differences; and he agreed that when it was prepared, he would furnish me with a copy, which he did; but I don't want the record to even

(Deposition of Anson Herrick.)

suggest that I in any way agreed or consented that any of the data contained in the report was admissible in evidence.

Mr. Barnett: I understand that perfectly; and I asked him for this in order that we might both be talking about the same thing; and when I asked him about a figure, that he could look immediately and see what figure I was talking about. I didn't understand that Mr. Levit's consent that this analysis be furnished to me has anything to do with the position that he has taken in this lawsuit; but only that he had no objection to my proceeding in an easier way than a hard way; but that he still objected; and whether I did it the easier way or the hard way, that it shouldn't be done at all. That is the way I understood it.

Mr. Levit: That is substantially correct.

Mr. Barnett: Yes, and I am not offering it as an admission in any way. The fact is, I am not offering it at all. I am trying to identify a memorandum which I am about to use, and which I will call to his attention when I ask him the questions. That's all. [48]

Q. Now, on this memorandum that we are just now talking about, at the very top appears this: "Operating income, total \$370,036.00." Is that what the appraisers found the total operating income was, or is that what we claimed it was?

Mr. Levit: Just a moment. I am going to object to the question on two grounds: In the first

(Deposition of Anson Herrick.)

place, I am going to object to any questioning with regard to this memorandum at all, and on this point at all, because it is entirely irrelevant and incompetent; it is not proper to impeach the award. Further, I am going to object to any references to the memorandum unless the memorandum itself is offered in evidence; and if it is offered, of course, I will object to it; but my objection on the second point is a technical one: That unless the memorandum is offered in evidence, the witness wouldn't be permitted to refer to it.

Mr. Barnett: I am not arguing with you on that.

I offer this in evidence; and then let me have it back. I want to use it.

Mr. Levit: To which we object on the grounds already stated; it is incompetent and irrelevant to any issue in the case; and it is not proper evidence with relation to any impeachment of the award.

(Document entitled "In re Pickering Lumber Corporation, B. I. Loss Claim, Finally Revised Computation," marked "Defendant's Exhibit 7.")

Q. (By Mr. Barnett): What is the figure of \$370,036.00, the [47] very first figure on Exhibit 7, just introduced, Mr. Herrick?

Mr. Levit: May it be stipulated that our objection goes to this entire line of questioning?

Mr. Barnett: Certainly, certainly.

(Deposition of Anson Herrick.)

A. That was the finding of the appraisers with respect to the operating income to be used as the base for the determination of the award.

Q. For the nine months or for the twelve months?

A. I might specify that that was the expected operating income for a period of twelve months.

Q. Do you know wherein that differed from the amount of the claim of the Pickering Lumber Corporation?

A. It was \$11,578.00 more than the amount of the—than the corresponding amount claimed by Pickering.

Q. Eleven thousand how much?

A. \$578.00.

Q. Can you account for the difference?

A. The operating income was computed by the insured as 53,607 feet at \$6.68 per thousand; and the appraisers considered the rate in error, and substituted a rate of \$6.90 per thousand; the difference of \$.22—

Q. Twenty-two cents per thousand—

A. The difference of twenty-two cents per thousand constituting the \$11,578.00.

Q. Do you know why the appraisers added twenty-two cents per thousand profit?

A. I have a general recollection; but to describe it adequately would necessitate [48] considerable refreshing of my recollection, and a very extensive explanation.

Q. Maybe if you had the key, we could figure it



(Deposition of Anson Herrick.)

for ourselves. What is your general recollection of it?

Mr. Levit: Let the record show the witness pauses at this point to consult various other papers in his file.

A. Well, this is off the record.

(Unreported discussion.)

Mr. Levit: I am going to request that this be on the record.

The Witness: Well, I don't seem to find my—a paper that will lead me to an appropriate answer.

Q. (By Mr. Levit): Well, then, I suggest that you so state.

Mr. Barnett: Well, just a minute. I will find out.

(Addressing Mr. Momyer): Do you know what it was?

Mr. Levit: Wait just a minute.

Mr. Barnett: I mean——

Mr. Levit: I am going to object.

Mr. Barnett: I will take him outside if you want me to, but if you——

Mr. Levit: I have no objection to counsel withdrawing for a discussion.

Mr. Barnett: Just let me see whether or not there is anything that we have got here that is worthwhile going in.

(Deposition of Anson Herrick.)

(Mr. Barnett, Mr. Brown and Mr. Momyer leave the room, subsequently returning.)

Mr. Barnett: He doesn't remember, [49] either.

Q. I want you to continue your search if you think you can find it, Mr. Herrick; and if you can't find it——

A. Well, I certainly can determine the reason; but I can't do it at this moment.

Q. Very well. Let us go on to the next thing. Let me say this: You have got that divided up between shook and lumber; and this exhibit indicates that you have got \$300,547.00 of that income from shook, and \$69,489.00 from lumber. Do you remember how you arrived at that division?

A. Have you got that Pickering report? It was based upon an allocation by methods which the appraisers jointly believed to be correct.

Q. Well, I have no doubt of that; but I was trying to find out the theory of it. Is that too board a question, or should I split it up? If so, I want to do it.

A. It is a pretty broad question, Judge; and it is a question that comes right down to the various extended considerations of the appraisers——

Q. In other words, that is not one question embracing——

A. Embracing matters of opinion, joined matters of opinion, compromise matters of opinion; a great many different things; and that is a question that is practically impossible to answer.

(Deposition of Anson Herrick.)

Q. In one question? A. Yes.

Q. I have asked you to tell me everything you have done, practically? [50]

A. Well, it seems to me that that question goes into the matter involving the details of the considerations——

Q. All right.

A. And the opinions of the appraisers.

Q. Yes. All right. The next thing on there you have got "Fixed charges and continuing costs," a total of——

By the way, we are still talking of the entire twelve months and not the nine months?

A. That's right.

Q. And for the twelve months, you have got "Fixed Charges and continuing costs, \$660,175.00." That, of course, was under item 2 of the insuring clause, fixed charges and continuing expenses, was it not? A. That's right.

Q. Was that more or less than had been put in by the claim of the Pickering Lumber Corporation?

Mr. Levit: I object to that on the ground that it calls for the conclusion of the witness. The figures speak for themselves.

Mr. Barnett: Yes, I know, but I want him to find them for me, because he is more apt than I.

A. It was more.

Q. How much more? A. \$15,095.00.

Q. Can you account for that?

(Deposition of Anson Herrick.)

A. With the exception of \$53.00, it constituted the depreciation on the destroyed property which had been omitted in part from the claim. [51]

Q. In other words, in fixing the amount of fixed charges and continuing expenses for the entire year, you added depreciation on the property that had been destroyed?      A. That's right.

Q. Did you add any part of that into the fixed charges and continuing costs for the nine months?

A. Yes.

Q. Is that the one that you say later was eliminated?

The Witness: Can this be off the record?

Mr. Barnett: Yes.

(Unreported discussion.)

The Witness: Are you referring to an elimination on this statement.

Mr. Barnett: Well, I will have to look at it myself.

The Witness: I think you are referring to a correction in the Pickering computation which he made——

Q. (By Mr. Barnett): Let me look at this. Look at page 3 of the statement. No, no, that is not it. Look at page 4, item 6, "Elimination of item included in 4." What is that?

A. The item of \$11,178.00 mentioned as a part of item 4 on page 4 of the statement represents the inclusion within fixed charges and continuing expenses of the proportionate part of this depre-

(Deposition of Anson Herrick.)

ciation applicable to the loss period, which was subsequently taken back as a recovery item.

Q. Well, now, see if this is correct: You first, in calculating fixed charges and continuing expenses under part 2 of the insuring clause, included fifteen thousand and some [52] dollars depreciation on the destroyed property.

A. That is correct.

Q. And there didn't any depreciation occur after it was destroyed?

A. I beg your pardon. Wait a minute. No, that's right. State the question again, please.

Q. There was no evidence that there should not have been any depreciation on the property after it was destroyed?

A. That's right.

Q. Why did you put it in in the twelve months period?

A. Because in determining your insurable value, it is necessary.

Q. For the twelve months period?

A. For the twelve months period, it is necessary to consider all continuing expenses, whereas in the computation of your loss you include only those expenses which necessarily continue.

Q. You are now talking about the contribution clause, is that the idea?

A. Yes.

Q. There is a provision——

A. To the extent that the contribution clause depends upon the so-called insurable value.

Q. When you say insurable value, you mean net profits and continuing expense?



(Deposition of Anson Herrick.)

A. That's right.

Q. Clause 4 of the policy provides: "It is expressly stipulated and made a condition of this contract that, in the [53] event of loss, this company shall be liable for no greater proportion thereof than the amount hereby insured bears to seventy-five per cent of the total of the net profits (Item I) and charges and expenses (as specified in Item II) which would normally have been earned during the period of twelve months immediately following the fire."

Is that the provision that you have in mind?

A. That is.

Q. And it was your idea—I am not arguing—I am trying to find out what happened, you see. It was your idea that to find out what would normally have happened during the twelve months, that normally there would have been that much depreciation?

A. That's right.

Q. And for that reason, it should have been added to the twelve months?

A. That's right.

Q. As a normal year?

A. That's right.

Q. But that while you put it in, you took it out again? You ultimately didn't allow it in the schedule on the ground that it didn't occur?

A. That is correct.

Q. In other words, because the policy says "would normally have been earned," in making the twelve months calculation you did not do it on the same basis that you did on the nine months?

(Deposition of Anson Herrick.)

A. That's correct.

Q. One was that it would have been, and the other was what it actually was?

A. That is correct.

Q. Did you add anything else besides that fifteen thousand [54] and some dollars in raising the twelve months profit figure presented by Pickering?

A. An item of \$53.00, which is the culmination of various adjustments, and the basis of which I don't recall, but none being of significance.

Q. What I mean, for instance, if the fire hadn't occurred, and it would have been a normal year following the fire, there would have been expense of millhands and things like that in running that mill. You didn't include that? A. No.

Q. Just that one thing, except for a few very minor matters which make a total of some fifty odd dollars?

A. That's right. In other words, there was no dispute as between the company and the insurers with respect to the computation of the amount of continuing expenses with the exception of this one item.

Q. The others were minor details?

A. Minor details.

Q. Which you picked up yourself as an accountant?

A. No, I think they were the net of a number

(Deposition of Anson Herrick.)

of variations due to a difference in the procedure adopted by Baker and by the company.

Q. (By Mr. Levit): When you refer to the company, of course, you are referring to the insured?

A. Pickering Lumber Company, the insured.

Q. (By Mr. Barnett): When you say the company, you mean the [55] Pickering Lumber Company?

A. The Pickering Lumber Corporation.

Q. When you say Baker, you are talking about the accountant of the insurance company?

A. Of the insurer.

Q. There was a figure of \$1057.18 which in Mr. Baker's—

Mr. Levit: One thousand and what?

Mr. Barnett: \$1057.18, which in Mr. Baker's statement, he called it adjustments to annual value. Did the appraisers adopt that adjustment?

Mr. Levit: If you remember, Mr. Herrick.

A. Where did that figure appear?

Q. (By Mr. Barnett): You ask me a question, and that means I have got to go to work. We will find it for you in a minute. I am not apt about these things. I have to have help.

What I meant by that, Mr. Herrick, is this: In Mr. Baker's statement under the heading "Insurable value and loss sustained based on experience from April 1st, 1944, to March 31st, 1945, and continuing costs during shutdown," the top page,

(Deposition of Anson Herrick.)

he shows this (Defendant's Exhibit 3 shown to the witness).       A. I see.

Q. And we have accounted for the fifteen thousand and some dollars, but we haven't accounted for that other, and that is in his total.

Mr. Levit: For the purpose of the record, let the record [56] show that counsel is referring to Defendant's Exhibit 3, the first large page, the last column, where the total appears of 13,984.99, and two lines above it, the figure of 15,042.17; and the difference between the two would be what counsel is asking the witness.

Mr. Barnett: I am asking him whether they adopted that or not.

Mr. Levit: Let the record show that while this question was being asked, Mr. Herrick made certain pen and ink notations about that last column on the sheet that I have just referred to, in which he subtracted the smaller of those two figures from the larger, and arrived at a differential figure of 1057.18.

Mr. Barnett: Yes, which is the figure I asked him about.

Mr. Levit: Correct. May I suggest, Mr. Herrick, that you don't mark these exhibits, but use some scratch paper?

A. All right. I have indicated that I made that note on March 3rd, 1948.

Q. (By Mr. Barnett): All right. I am not taking any exception to anything that he has in-

(Deposition of Anson Herrick.)

served in there. It is perfectly proper that he should. He is just trying to keep it straight.

Can you tell me whether or not the appraisers adopted that or not? Can you tell by your notes?

A. My conclusion is that we did not, because our difference in that is only \$53.00 in comparison with \$1057.00.

Q. In other words, your conclusion from the amount of [57] differences between by your figure and this is that you did not go along entirely with it?

A. That's right.

Q. To some extent, but not entirely. But the whole thing, so far as the appraisers were concerned, came to——

A. \$53.00.

Q. And so we will let that go.

There is an item of \$211.46 by which you reduced the amount you finally found. Do you know what that was for?

Mr. Levit: What was that figure again?

Mr. Barnett: \$211.46.

Mr. Levit: Where do you find that here, Judge Barnett?

Mr. Barnett: I will find it for you in a minute, if I haven't lost my papers, which I probably have. I am now——

The Witness: I think you are referring to page 3.

Mr. Barnett: Of the analysis which you got up?

A. Yes.

Q. That we are using as an outline?

A. That's right.



(Deposition of Anson Herrick.)

Q. Oh, yes, right down at the bottom of page 3, it says "As shown by finally revised computation of loss 660,175, less arbitrary reduction to produce a total of \$1,030,000," and it says \$211.00. I said \$211.44.

Mr. Levit: Forty-six cents, I think you said.

Mr. Barnett: Did I?

Mr. Levit: Yes.

Mr. Barnett: Well, all right. [58]

Q. What was that for?

A. Just exactly what it says, Judge.

Q. Maybe it is perfectly plain what you did, but what I mean is why did you do it?

A. To arrive at the insurable value of the amount of \$1,030,000.00, in recognition that no computation—no finding of such an amount in such a matter is capable of being asserted to be correct within the dollar.

Q. In other words, you made a computation; and if you stuck to it, the award was going to end up in odd cents, and you just reduced it \$211.00, to make a round figure of it?      A. That's right.

Q. All right. Off the record.

(Unreported discussion.)

Q. (By Mr. Barnett): In these same figures, under the 660,175, you following up by showing \$35,608.00 of that is fixed charges and continuing expense applicable to shook, and \$272,477.00 to lumber, and \$352,090.00 to logs.

(Deposition of Anson Herrick.)

Mr. Levit: May I point out, Judge, I think you misread the top figure.

Mr. Brown: That is right, he did misread it.

Mr. Barnett: Well, if I said six, I mean five. It should be \$35,608.00.

Mr. Levit: I think you said thirty-six.

Mr. Barnett: \$35,608.00.

The Witness: Will you restate the question?

Mr. Barnett: I have only made a statement so far; and I say the fixed charges and continuing expense, of a total of \$660,175.00, you have allocated as follows: \$35,608.00 to shook; \$272,477.00 to lumber; and \$352,090.00 to logs.

Mr. Levit: Pardon me just a moment. In order to clarify this, may I suggest that the reporter be instructed to number the pages of Exhibit 7 in this order:

Page No. 1 to be the page headed "Finally Revised Computation";

Page No. 2, the page headed "Box Factory 'Salvage' Statement";

Page No. 3, headed "Reconcilement of Insurable Value and Loss as Claimed with Appraisal"; and

Page No. 4, headed on the left "Composition of appraisal changes."

And may I further state that the figures to which counsel has just referred are on page 1 on the second line. May it be so stipulated?

Mr. Barnett: Certainly. It helps out.

The Witness: Your statement is a little in-

(Deposition of Anson Herrick.)

correct, Judge. The allocation which you mentioned is headed by the statement "per Baker."

Q. (By Mr. Barnett): Oh, that isn't what you did?  
A. No.

Q. That is what the accountant for the insurance companies did?  
A. That's right. [60]

Q. Yes, it does say "per Baker." Well, on your statement, do you show how you did it?

A. Yes.

Q. And on what page?

A. On the same page. We increased Baker's allocation to shook by \$4,311.00; we increased the allocation to lumber by \$16,417.00; and decreased the allocation to logs by \$20,728.00.

Q. And that is the reason you have got in parantheses \$20,728.00 up there, to indicate where you——

A. To indicate that that is a reduction.

Q. From Baker's figures. Not from the insurance companies' but the Baker report figure?

A. That's right.

Q. Can you tell us how you arrived at it? We are now talking about the whole year, are we?

A. We are talking about the whole year.

Q. And we are only talking about fixed charges and continuing expenses?  
A. Right.

Q. All right.

A. Mr. Baker has allocated——

Mr. Levit: Let the record show that the witness

(Deposition of Anson Herrick.)

is now referring—is now using and referring to Defendant's Exhibit 3.

A. (Continuing): ——a percentage which the appraisers considered excessive, and which the appraisers reduced to thirty-five per cent.

Q. (By Mr. Barnett): The percentages used by the appraisers are shown under the next computation entitled "Total annual, [61] portion applicable to period April 7th to July 7th, 1946," am I right?

A. No, the percentage used by the appraisers is shown under the caption "To reduce logging overhead to 35%."

Q. Where is that?

Mr. Levit: It is right under the words "per Baker" on page 1 of Exhibit 7.

Mr. Barnett: Oh, I see. You haven't got that all together. You show what your reduction amounted to.

A. That is correct.

Q. What was Mr. Baker's percentage, do you remember?

A. 43.45%.

Mr. Levit: Let the record show that the witness refers to Exhibit 3, Schedule No. 3, and the penciled figure in the last column on that page.

Q. (By Mr. Barnett): Do you remember how the appraisers arrived at 35% on the percentage applicable to logging?

A. On the bases of their experience and opinion.

Q. Did you not use any rule?

A. No.

Q. Did they take into consideration any evidence upon which they applied their judgment?

(Deposition of Anson Herrick.)

A. They gave consideration to evidence, yes.

Q. As to the amount of logs and the amount of lumber and the amount of shook?

A. They gave consideration to testimony which had been presented at the hearing, and to their experience. [62]

Q. And put down what they thought was fair?

A. That's right.

Q. Do you remember the basis upon which Mr. Baker arrived at his forty some per cent?

A. My recollection is that he distributed it—that he arrived at his percentage on the basis of the ratio with direct labor.

Q. Then, if I understand it, the appraisers considered that evidence, but did not go completely along with it?

A. No, we did not.

Q. It was just a matter of judgment?

A. Just a matter of judgment.

(Unreported discussion.)

(Thereupon an adjournment was taken until 2:00 o'clock p.m. on Wednesday, March 3rd, 1948, at the same place.) [63]

Offices of Messrs. Severson, Brown, Keough & McCallum, Room 1004, 605 Market Street, San Francisco, California,

Wednesday, March 3rd, 1948

2:00 o'Clock P.M.

(Pursuant to the foregoing adjournment, the deposition of the witness Anson Herrick at the above time and place was resumed, there being the same appearances as hereinbefore noted on page 28.)

### ANSON HERRICK

recalled as a witness on behalf of the defendant, having been previously duly cautioned and sworn by the notary public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

By Mr. Barnett:

Q. I am now looking at Mr. Baker's report—Mr. Levit can tell you the exhibit number; I can't.

Mr. Levit: Exhibit 3.

Q. (By Mr. Barnett, continuing): —which is Exhibit 3, and the first page—

Mr. Levit: Which is not one of the great big wide pages, but just a sheet.

Q. (By Mr. Barnett, continuing): Right, that first sheet, which is a regular typewriting sheet, and it has four items here, "Excessive logging costs, 42,797.04; Grazing rentals, [64] 1,461.81; Log stain, 36,149.95; and Log Decking,



(Deposition of Anson Herrick.)

12,492.35." That is all in typewriting; but in ink, there is a bracket embracing those four figures, and set out in pencil it says \$25,000.00.

I understand that that is your own notation.

A. That's right.

Q. What does that mean, Mr. Herrick?

A. It means that the appraisers allowed \$25,000.00, a round amount, to cover all of the claims embraced within those four items. And I might point out, while it is not of importance, that the \$1,461.00 that you mentioned is a credit item.

Q. That is right. The parenthesis indicates that we had given credit against our original claim. It was one of those things we pointed out at the trial—at the hearing.

A. It is not important, Judge; but I don't remember that that came up. It may have been mentioned.

Q. All right. If you say it is not important, let it go; but I mean I haven't overlooked that that has the opposite effect of the other items.

A. That is right. Or, rather, in point of fact, the \$1,461.00 probably just wasn't even considered. The \$25,000.00 is more related to the excessive logging costs, the log stain and the log decking.

Q. Yes. Now, do you remember how you arrived at that \$25,000.00 figure? [65]

A. The result of long debate.

Q. Well, I will try to be more specific.

A. I can't give you anything beyond that, Judge.

(Deposition of Anson Herrick.)

Q. I don't deny that you answered my question, but it seems to me I still don't—

A. I can simply say that that was the result of the combined judgment of the appraisers.

Q. The excessive logging costs, \$42,797.04, is found in the proof of claim, isn't it?

A. That's right.

Q. And the insurance companies denied any liability for it at all? Let me look and see what they did about it.

A. I am not sure about it. Yes, they did.

Q. They denied any liability at all.

A. They denied any liability at all.

Q. And the excessive logging costs were figures that appeared on page 22 of the proof of claim, were they not?

A. Well, I don't remember the page number.

Q. I will show it to you.

(Document shown to witness.)

A. Yes, you are right.

Q. Page 22. Did the appraisers attempt to find out whether there was anything wrong in the figures used for making up that schedule, or was that accepted.

A. I think the appraisers accepted the figures as shown by the—on page 24, which was the basis for the computation of the claim on page 22. [66]

Q. On page 22. That is more accurate. They accepted the figures on page 24 which resulted in the calculation on page 22?

(Deposition of Anson Herrick.)

A. That's right.

Q. That is better. What was the point about it, then? How did it come about that all of these things were reduced to \$25,000.00?

A. Well, Judge, that is a difficult question to answer. I might say that it is almost an impossible question to answer directly. There were days and days of discussion and debate with respect to that and to many other things; and the \$25,000.00 was the final figure that was agreed upon as an allowance on account of all of these claims.

Q. But it was not on account of——

A. Inaccuracy of this? No.

Q. The question of the accuracy of the figures.

A. No.

Q. Now, as to the grazing rentals, as you have explained it, while the \$25,000.00 includes that, as a matter of fact it couldn't have been considered, because it wasn't a claim, it was a credit.

A. Yes, it was a credit.

Q. Now, on the log stain and the decking, and so forth, was there any evidence introduced at all as to the amount of that log stain that would have occurred within nine months?

A. Very complete evidence on the part of Mr. Moffett.

Q. Mr. Moffett was employed by the Western——

A. No, Mr. Moffett was a lumber inspector or surveyor.

Q. Yes, the timber engineer. And Mr. Moffett

(Deposition of Anson Herrick.)

was the man—who was the man that actually made the check—went out and checked to find out how much stain there was?

Mr. Levit: If you know, Mr. Herrick.

A. The tally was made by Mr. Moffett.

Q. (By Mr. Barnett): He was an employee of the Western Pine Association?

A. Mr. Moffett was an employee—he was—I think they called him lumber surveyor or lumber inspector of the Western Pine Association.

Q. Yes, that's right; but he only reported on the amount of it, didn't he?

Mr. Levit: Just a moment. I object to that question on the ground it is argumentative.

Mr. Barnett: All right.

Mr. Levit: And leading.

Q. (By Mr. Barnett): Do you know what part he took?

Mr. Levit: That question can be answered "Yes" or "No," Mr. Herrick.

Mr. Barnett: It can be after he refreshes his recollection.

A. Mr. Moffett testified that he had made a test run, or was present while this test run was made on these logs; the test taking place between November 1st and November 22nd, 1946; and that he then tallied and graded the lumber; and that he had kept control of the logs and the sawing and the grading; and [68] that the test comprised 239,000 board feet.

Mr. Levit: Mr. Herrick, were you reading from

(Deposition of Anson Herrick.)

notes in your file that you made at the time that the appraisers' hearings were held?

A. I was reading from my pencil notes.

Mr. Levit: Made at the time of the appraisers' hearing? A. Made at—contemporaneously.

Mr. Levit: Yes.

Q. (By Mr. Barnett): What about Mr. Thomas? What did he have to do with it?

A. Mr. Thomas testified that he had been employed by the Pickering Lumber Company to analyze the Moffett tally; that he was present during the Moffett work, and personally checked to determine that Moffett had taken a fair sample of the logs; and that upon the basis of the Moffett tally, he had estimated the deterioration which had taken place between July 7th, 1945, to April 7th, 1946, during a period of nine months, and also the deterioration which had taken place from April 7th, 1946, to July 7th, 1946; and the further deterioration that had taken place subsequent to November—subsequent to November 1st, 1946.

Q. What I am getting at is this: The log stain was estimated, the part that was claimed—instead of the part that Mr. Moffett found, only the part that was estimated to have occurred by Mr. Thomas—that is the part that is represented in the figure here? A. That is my recollection. [69]

Q. Did the appraisers come to the conclusion that the testimony was wrong, or was that what the trouble was? A. No.

(Deposition of Anson Herrick.)

Q. That was not the trouble?

A. That was not the trouble.

Q. Well, now, the log decking, \$12,492.35, as I understand it, that is the figure that Pickering claimed?

A. That's right.

Q. And that is the figure shown by the figures that they had in their proof of claim?

A. That's right.

Q. Did the appraisers question the accuracy of the figures as to how much expense there was for log decking?

A. No.

Q. That was not the trouble?

A. That was not the trouble. But that isn't quite proper to say that that was not the trouble. The question of the accuracy of the computation of those figures was not raised.

Q. All right. When I say that was not the trouble, the accuracy of the figures that I have just been talking about was not the thing that caused discussion for days?

A. No.

Q. What was it that was the cause of the discussion?

A. The question as to the allowability of it at all.

Q. I notice that it all has to do—both the excessive logging costs and log decking and the log stain, all had to do with the logging operations.

A. That's right. [70]

Q. What did the appraisers decide about the logging operations?

A. That there should be an allowance of



(Deposition of Anson Herrick.)

\$25,000.00 on account of these claims. Now, Judge, there were days of argument on that point and varied points. And I think you can understand that I don't recall at this time—ten months after—all of the points that were argued.

Q. Yes, I do understand that. I am not blaming you.

A. I said I thought you could understand.

Q. Yes, I can understand it. Yes, I am still trying to find out as best I can—well, was the \$25,000.00 a figure that was arrived at by any kind of computation? A. No.

Q. Was it arrived at by agreement?

A. Yes.

Q. Was there a dispute between the appraisers as to whether these things should be allowed at all or not? A. Yes.

Q. Is that what resulted in the agreement?

A. Yes.

Q. Was it a compromise?

A. You might call it—yes, I think you would call it a compromise.

Mr. Levit: What page of your notes is that, please?

The Reporter: 184.

Mr. Barnett: Let me see where I am. I have got to get rid of you today; and I want to do it, whether I do a perfect job or not. [71]

Q. Notwithstanding the fact that, as you say, they treated the logging operations as a—it wasn't

(Deposition of Anson Herrick.)

treated as a part of the partial operation after the fire?

Mr. Levit: I didn't get the question.

A. Oh, yes, it was. It entered into the computation of the loss after the fire.

Mr. Levit: May I have that read back? I am sorry. I missed the first part of it.

(Record read as requested.)

Q. (By Mr. Barnett): It was treated as a part of the partial operations after the fire?

A. Yes.

Q. Do you remember, then, the theory upon which it was held that except the \$25,000.00 by agreement or compromise, it shouldn't be allowed—upon what theory it wasn't?

A. I think I can only answer that by explanation, Judge.

Q. That is what I expect.

A. The logging operations were considered as entering into the computation of the loss after the fire as a factor of recoverable overhead.

Q. I knew that. I knew that. But only to that extent? A. Only to that extent.

Mr. Barnett: I am not going to try to play this up by putting some leading questions, but it is only to relieve him of a long answer that is going to come out anyway.

Q. Was it your idea that a part of the cost after the fire went into logging, and they still had logs on

(Deposition of Anson Herrick.)

the way, [72] and for that reason they should absorb this cost? Was that the idea? I am not sure of it, but I just expect that.

A. Why, that is fundamental, Judge.

Q. Well, am I right?

A. Certainly, you are right on that.

Q. He is going to finally say it; so if I ask a leading question, it will save a lot of time. Otherwise he wouldn't know.

A. I think I can assure you, Mr. Levit, that leading questions isn't going to produce a different answer.

Q. I know that.

Mr. Levit: I know that. I just don't want to encourage it too much.

Mr. Barnett: It is a bad practice.

A. I think I was guilty on that during the hearing myself.

(Unreported discussion.)

Q. (By Mr. Barnett): But it was not considered a partial operation on the theory that any loss incident to it was to be balanced against any profit made by the box factory, am I right?

A. Read that question back.

(Question read by reporter.)

A. No.

Q. Well, explain it, then.

A. The three departments all were covered—or it was my understanding that it was recognized that

(Deposition of Anson Herrick.)

all of the three departments were covered by the policy; and consequently, all [73] three of them had to be taken into consideration; but there was no consideration of balancing one against the other.

Q. What I am getting at is this: I am necessarily going to be inartistic because of what I say, but you will have to bear with me while I am fumbling with the question; but what I am getting at is this: You didn't allow the log stain as depreciation, but you did allow depreciation on the box factory in assigning what profit was to be made by the box factory? A. That's right.

Q. And you treated both of them as partial operations? A. Yes.

Q. I am not criticizing. I am just asking to find out. Now, why did you allow the depreciation incident to the box factory to partial operation but not incident to the logging partial operation?

A. The so-called log stain was designated in the claim as depreciation; and if you will pardon me for saying so, Judge, that was not true. It was not a depreciation as the term is understood. It was a deterioration, which was not a continuing expense. If allowable, it would be what we call expediting expense. And if allowable as an expediting expense, would not have been controlled, in my opinion, by the co-insurance provision.

Mr. Barnett: Read that to me, please.

(Record read by reporter.)

(Deposition of Anson Herrick.)

Q. By the co-insurance provision, you are talking about [74] that section 4 that I read to you this morning?

A. Yes, the contribution.

Q. All right. I'm not making any point about that. I get mixed on the two. I just want to be sure that we understand each other. I understand what you say; but in the brief filed by the Pickering Lumber Corporation, it was claimed that that depreciation was also allowable, and it was part of the cost of partial operation in logging. Now, did you consider that claim?

A. That entered into the allowance of \$25,000.00.

Q. That was the part that you couldn't agree on, as to whether it was——

A. The two things: The excessive logging costs and the stain.

Q. And the decking?

A. And the decking.

Q. Three things, really.

A. Yes.

Q. I understand it now. As quick as I understand, I am ready to quit. I don't want to argue the matter.

A. Well, we are not arguing the matter.

Q. Well, I couldn't understand it.

(Unreported discussion.)

Q. (By Mr. Barnett): Handling these logs, while we are on logs, when you were allocating the total profits prevented, you didn't allocate any to logs; you allocated part to box factory and part to sawmill, but none to logs?

A. Well, there was no profit—no recovery—no

(Deposition of Anson Herrick.)

postfire [75] operation or profits in logs. The only factor was the recovery of overhead.

Q. Now, I think I understand what you mean when you say recovery of overhead, but I wish you would explain it; and I want to know that I do.

A. During the postfire operation, overhead naturally continued.

Q. That's right.

A. A portion of that overhead was applicable to logging operations, and a portion to box factory operations. It was presumed that the logs which were produced had a value at least equal to their cost, including the overhead, so that——

Q. Wait a minute. I will put this in. And we still have the logs?

A. And you still have the logs.

Q. All right.

A. In other words, the overhead, which has been charged to logs, was recovered through an existence of an equal value in the logs, but without profit.

Q. That is what I thought you meant, but I wondered whether I understood it.

While we are on logs, do you remember the evidence showed that when the fire occurred there were certain logs already felled but in the woods; and that other logs were felled afterwards?

A. I recall that generally, yes.

Q. Was there a distinction in the handling of the logs in that situation on account of that fact?

A. No.

Q. Logs felled before and after the fire?



(Deposition of Anson Herrick.)

A. No. [76]

Q. You didn't think there would. I couldn't find out, but I didn't know.

Do you remember that there was evidence to the effect that within a very short time—I think about five days after the fire—Pickering got word that they could get enough machinery to get at least one side of the double-deck mill running in less than nine months? A. Yes.

Q. And that they immediately began bringing in the logs?

A. Yes. Well, just a moment. I don't remember that there was testimony that immediately upon that——

Q. All right.

A. (Continuing): ——they started to bring in the logs.

Q. All right.

A. But I know the testimony was to the effect that the logging operations were continued.

Q. After getting evidence from Filer and Stowel that they could get one side of the mill in operation within less than nine months?

A. Well, my recollection is this: That their testimony was to the effect that they could get the mill—or, that is, that they thought that they could get the mill running within nine months; so one of the factors was that it resulted in the continuation of the logging operations.

Q. There was evidence that Filer and Stowel had a strike, and that didn't materialize?

(Deposition of Anson Herrick.)

A. I believe there was. [77]

Q. And there was evidence that after that they didn't get it, and that they didn't bring in any more logs?

A. I don't recall that. It may be correct.

Q. Did the appraisers question that testimony?

A. No.

Q. That had nothing to do with the finding?

A. No.

Q. Did the appraisers have any question about the good faith of the logging?

A. No. I might supplement that by saying that the question of good faith of the Pickering Lumber Corporation never entered into consideration.

Q. I didn't think so, but I was going to ask you that. I thought it might.

A. On the part of no one of the appraisers or the umpire.

Q. You never said it before, but I always thought that if it did, you would have been sterner when you saw us after that.

Now, on the box factory, if I remember what you said this morning, in arriving at the profit on the lumber coming from the sawmill, you arrived at it by taking the cost of the timber to Pickering and adding to it all the costs that they incurred in converting it into lumber. A. Yes.

Q. You didn't do it that way for the box factory, did you? How did you arrive at the profit for the box factory?

(Deposition of Anson Herrick.)

A. The profit for the box factory was arrived at by taking the constructed market price for the lumber that was [78] converted into shook, and the expenses of operating the box factory, and deducting the aggregate from the proceeds of the shipments.

Q. While I consider your answer technically and completely accurate, Mr. Herrick, it is not informative about something that is not too familiar to us. Explain to us what "constructive market price" was?

A. The constructed market price was the so-called legal price at which the lumber could have been sold—that is, the lumber which was converted into—through the box factory—could have been sold as lumber, plus the most advantageous freight differential.

Q. Which, by the way, was a part of the OPA price, wasn't it?

A. No. The OPA prices were on a basing point of Susanville; and there was added to the OPA the freight from Susanville to the point of destination, less the actual freight from Standard to the point of destination.

Q. I understand that; but what I was getting at—I didn't express myself accurately—if they had sold under OPA, they would have been permitted to sell it that way, wouldn't they? A. Yes.

Q. In other words, the OPA prices being based at Susanville, if you could sell at prices where the

(Deposition of Anson Herrick.)

freight was less than that, you actually could make that freight differential by selling under the OPA?

A. Yes. [79]

Q. That is the reason you put it in?

A. That is right. That is the reason.

Q. In other words, you took the OPA price, the way they actually operated if you sold under their price, rather than as an abstraction?

A. The constructed market price which was used was based on the sale—I think for half of the quantity at Modesto or Merced delivery, at which point it would have given the company the greatest return; and the other half at Fresno, which gave it a little less return, and it was averaged out.

Q. And the reason you took that was because that was the best you could do? A. Yes.

Q. Not having been actually sold there, wasn't the charge then varied; and you tried to do it on some reasonable basis? A. That's right.

Q. All right. Now, there was testimony given before you—and when I say testimony, I am not talking about sworn testimony——

A. I understand that.

Q. Witnesses got up and told you—they were not required to be sworn—to the effect that the OPA prices on a very great portion of the lumber that went through the box factory was below cost. Do you remember that?

A. I don't remember testimony specifically to that point or upon that point, but it was completely

(Deposition of Anson Herrick.)

recognized that the OPA prices on the quality and the grade of lumber that went through the box factory was less than the average cost of all [80] lumber produced.

Q. Do you remember that there was evidence to the effect that Pickering couldn't have bought the lumber that went to the box factory at the OPA ceiling prices?      A. Yes.

Q. Did the appraisers question that testimony?

A. No. Not only did the appraisers not question it, but it was within their general knowledge.

Q. They knew that was the fact?      A. Yes.

Q. That it couldn't be bought at that price?

A. Yes.

Q. Then you didn't take OPA prices on the theory that Pickering could have actually paid that?

A. Yes, that is right.

Q. You only considered it in the light that they would not have been able to sell it at any higher price?      A. That's right.

Q. If they had sold, that would have had to be out on the market?      A. That's right.

Q. The appraisers didn't find that there was any actual market in the sense of actual open sales and purchases at other than OPA prices?

A. Well, I don't think they found that because—it may have been that there were some sales of lumber made at those prices.

Q. You didn't have any testimony before you to that effect?      A. Not that I recall.



(Deposition of Anson Herrick.)

Q. All right. I am trying to find the basis of why you [81] found——. Then explain to me why you used OPA selling prices.

A. Because those were the only prices of which we had knowledge at which the lumber could have been sold as lumber.

Q. In the absence of any actual active market, you couldn't find any other figure, do you mean?

A. Couldn't find any other figure to tie to or, upon which there could be agreement among the appraisers.

Q. In other words, you could think of something, but you couldn't get together?

A. Nothing to tie it to.

Q. All right. I am asking you simply to keep straight. Reputable men offhand say things and mean them, and on further investigation, on looking into it, they remember more than they had in mind when they said it. And Mr. Lilly was under the impression offhand that he wasn't consulted, and that he didn't have to pass an opinion on this matter when he acted as umpire.

A. What?

Q. Mr. Lilly made a statement that he didn't know anything about this, because he wasn't called upon to pass on anything as umpire, because there was no agreement. Is that correct? Is that according to your recollection?

A. I don't quite understand the question.

Q. I will leave out what Mr. Lilly says. That has nothing to do with it. [82]



(Deposition of Anson Herrick.)

Were the appraisers on all points able to get together, or did they have to leave some things to be decided by the umpire?

A. Why, the very fact that the umpire was called in must be evidence that his decisions were necessary.

Q. It does; but I wasn't sure that he was called in. I am asking you about it.

A. Well, I think it was well known.

Q. No, I don't. I am in ignorance about the matter. I just want the facts.

Mr. Levit: If he wasn't, then why did he sign the award, if the appraisers had agreed?

Mr. Barnett: I would rather have the facts than to deduce it. It has been deduced a long time, but I want to find out how it was this time.

A. I have forgotten how many days of conference there were between the appraisers before Mr. Lilly was called in; but Mr. Lilly was called in to assist in reaching an agreement.

Q. Do you remember how many items were submitted to him? We are going to take his deposition, but I want your recollection before we take his deposition.

A. I wouldn't want to say how many.

Q. Do you remember any of them?

A. Frankly, it seems to me, Judge, that is a matter which involves the various considerations of the appraisers, which I shouldn't answer. [83]

Q. Well, if I have asked you anything improper,

(Deposition of Anson Herrick.)

I don't want to; but I don't understand why. Mr. Lilly hasn't done anything he thought is wrong.

A. Absolutely not.

Q. And if his memory is refreshed that he——. I am trying to be as helpful to everybody to get this actually as it was.

A. The principal point upon which Mr. Lilly assisted in reaching a consensus was the determination of the box factory prices.

Q. As to whether OPA selling prices should be added?

A. As to what valuation should be placed upon the lumber.

Q. That was the principal one. Do you remember any others?

A. The general matter of logging overhead and logging costs.

Q. And as to whether it was an insurable loss at all or not?

A. No, I don't think that was a question.

Q. What was it, if you remember?

A. There were two questions involved in that: One was the percentage of overhead applicable to the logging.

Q. Which this morning you said you used your judgment.

A. Our combined judgment. And the amount of allowable on account of stain and excess logging costs.

Mr. Levit: What was that second?

(Deposition of Anson Herrick.)

Mr. Barnett: The amount allowable on account of excess logging costs. That was the matter of the \$25,000.00.

Let me speak to my two associates. I think I am through. [84]

(Unreported discussion.)

Mr. Barnett: Well, that is.

By Mr. Levit:

Q. Mr. Herrick, it is correct, is it not, that in connection with all of these matters on which you have testified in response to Judge Barnett's questions, and which entered into the computation of the loss, it was necessary for you and the other appraiser and the umpire to exercise your judgment in arriving at a conclusion, was it not?

A. Correct.

Q. And I take it that you, speaking for yourself, did exercise your judgment in connection with each of those matters? A. I did.

Q. Mr. Herrick, before commencing this appraisal, you and Mr. Maloney had been appointed to act as appraisers—you by the insured, Pickering Lumber Corporation, and Mr. Maloney by the insurers, is that correct? A. That is correct.

Q. And before starting on the appraisal, you and Mr. Maloney agreed upon Mr. Lilly as the umpire?

A. Correct.

(Deposition of Anson Herrick.)

Q. As a matter of fact, it was you, was it not, who suggested the name of Mr. Lilly as umpire?

A. Yes.

Q. I believe you wrote a letter, did you not, to Mr. Maloney, in which you gave him three names as possible umpires [85] who would be satisfactory to you?

A. I think I did. In fact, I am sure of it. I don't recall the three names; but I do recall that Mr. Lilly was at the top of the list.

Q. Mr. Herrick, you recall now, do you, that you suggested Mr. Lewis Lilly as your first choice, Mr. Addison Strong, of Hood and Strong, as your second, and Mr. Rollin P. Rodolph, of Rollin P. Rodolph Company, as your third choice?

A. Right.

Q. Those firms are all certified public accounting firms, are they not?      A. Right.

Q. Did Mr. Maloney suggest any umpires?

A. Yes.

Q. Were there any common names on your respective lists?      A. No.

Q. So that the selection of Mr. Lilly was a selection of the—of one of the three chosen by you?      A. Right.

Q. It is a fact, is it not, Mr. Herrick, that in the conduct of this appraisal it was necessary that some one of the three of you—I am referring now—I will use the generic term of appraiser rather than umpire in mentioning them.

(Deposition of Anson Herrick.)

A. That is all right.

Mr. Barnett: They can be understood as being appraisers unless otherwise designated.

Q. (By Mr. Levit): It was necessary as a practical matter for one of the appraisers to take the lead in analyzing these figures and analyzing the points of agreement and disagreement [86] among you, and analyzing the various possibilities and contentions, was it not? A. Right.

Q. And it is a fact, is it not, Mr. Herrick, that you actually took the lead in those matters?

A. That's right.

Q. That was true during the entire time of the appraisal, and up to and including the time of the award, was it not? A. That's right.

Q. That was done, I take it, with the full consent and approval of the other two appraisers?

A. Right.

Q. It is a fact, too, is it not, that in an appraisal of the size and complexity of the one here involved, there were necessarily many points that had to be discussed at considerable length and written out?

A. Right.

Q. And someone had to take the initiative in framing and bringing together the varying viewpoints? A. Right.

Q. And in this case and during this proceeding, you took that initiative, did you not, largely?

A. Yes, at least up to the point of the umpire being brought in.

(Deposition of Anson Herrick.)

Q. Yes. Now, in your computation which has been introduced in the course of this deposition as Exhibit No. 7, you refer on page 1 to a letter of May 14th, 1947, to Barnett. You recall that?

A. Yes.

Q. Was that a letter which you wrote to Mr. Barnett?           A. Yes.

Q. And you have that letter? [87]

A. Yes; and that is the letter of which you asked me to prepare a copy; and it has not been prepared merely because my stenographic department didn't have the time to do it.

Q. What was the occasion for the writing of that letter, Mr. Herrick?

A. Shortly following the award, Judge Barnett called upon me and asked me for a brief statement with respect to the composition of the award.

Q. And in response to that request, you wrote the letter to him of May 14th, 1947?           A. I did.

Mr. Levit: We should like to offer that letter in evidence, and ask that it be marked as Exhibit A of the plaintiffs.

Mr. Barnett: No objection.

Q. (By Mr. Levit): And I assume, then, Mr. Herrick, that you will furnish a copy to the reporter and a copy to me?           A. You say Exhibit A?

Q. Exhibit A.

Mr. Barnett: Is that the one—when I went to you, and you told me—I couldn't follow what you said then—and said to write a letter and tell me



(Deposition of Anson Herrick.)

about it, and you wrote to me. I was in San Francisco at the time. Is that the one?

A. Yes, that is the one.

Mr. Barnett: Yes, I remember that. I was here, and I asked you to write me what you had told me at the time. A. Yes. [88]

Q. (By Mr. Levit): Now, Mr. Herrick, did you have any other correspondence, or did you exchange any other written documents with Mr. Barnett or with the Pickering Lumber Company, or with any of the officers or principals of the Pickering Lumber Company after the award was made, in addition to this letter of May 14th, 1947, and the computation which has been introduced here in evidence as Defendant's Exhibit 7? A. No.

Q. You haven't written any other letter?

Mr. Barnett: Do you mean at any time?

Mr. Levit: At any time since the award was signed.

Q. (By Mr. Barnett): In the last three days, Mr. Herrick, a letter was delivered here.

A. Oh, yes.

Mr. Barnett: Yes, a letter was delivered here yesterday.

A. Yes.

Mr. Levit: Do you have a copy of that letter?

A. No.

Mr. Barnett: I have.

Mr. Levit: Do you have it? May I see it?

Mr. Barnett: Let me find it for you.

Mr. Brown: I have it right here.

(Deposition of Anson Herrick.)

Mr. Barnett: You have it?

A. I gave you two copies of that.

Mr. Brown: Yes, you did.

Mr. Barnett: He said at any time. That means up to today.

A. I completely overlooked that. I had tried to think of [89] something I had written to the company or to you aside from this.

Mr. Barnett: Well, it is all right.

A. I don't think there was anything——

Mr. Barnett: No, that is all right.

(Unreported discussion.)

Q. (By Mr. Levit): Mr. Herrick, I show you what purports to be a copy of a letter addressed to Judge Barnett on your letterhead dated March 1st, 1948, and ask you if this is the letter which you wrote and sent to Judge Barnett.

(Document shown to witness.)

A. That's right.

Mr. Brown: We will stipulate it is.

Mr. Levit: We offer that in evidence, and ask that it be marked Exhibit B. No objection to the copy instead of the original?

Mr. Barnett: No, I don't care. We are just trying to find out what happened.

(Carbon copy of letter on letterhead of Lester Herrick and Herrick, from Anson Herrick to Judge Paul V. Barnett, dated March 1st, 1948, marked "Plaintiffs' Exhibit B.")

(Deposition of Anson Herrick.)

Q. (By Mr. Levit): Mr. Herrick, you referred to the fact that during the conduct of the hearings on the appraisal you took certain pencil notations on the testimony that was given. A. I did.

Q. And you subsequently prepared a document which was [90] typed, headed "Notes relating to the hearing of the matter by the appraisers," did you not? A. That's right.

Q. Is that a transcript of your penciled notes?

A. No, this is a dictation from my penciled notes.

Q. Would you say that, looking at it fairly, it contains the substance of all of the material in your notes? A. That was my intention.

Q. And as far as you know, that is the fact, is it not? A. That's correct.

Q. All right. Do you have the typewritten summary that you prepared of those hearings?

A. Yes.

Q. May I ask that it be produced and marked.

A. Yes, it is here.

(Unreported discussion.)

Mr. Levit: I have it here; and I will be glad to furnish this copy, if you will identify it, to the reporter, and he can then copy it for the purpose of the deposition without the penciled notations that are on it.

Mr. Barnett: You put the pencil notations on it yourself?

(Deposition of Anson Herrick:)

Mr. Levit: I don't know who put them on. I didn't.

Mr. Barnett: They weren't put on by Mr. Herrick.

Mr. Levit: He told us that.

A. No, they weren't. They were unquestionably put on by Mr. Maloney.

Mr. Levit: I will offer that document, after you have identified it, Mr. Herrick, as Exhibit C. [91]

A. Correct.

Mr. Barnett: If Mr. Maloney put some pencil notations on it, I would like the whole thing to go in with his explanation, because when we come to Mr. Maloney we will ask him about it.

Mr. Levit: I will have the document here, in any event; and I have no particular objection to having Mr. Brown's go in as the original exhibit, except for the fact that it would require photostating to reproduce it. I will endeavor to have it here when you are examining Mr. Maloney; but I would suggest, if it is agreeable, that for the purpose of the record the reporter be instructed to make a copy of that, and attach it to the original and to the other depositions.

Mr. Barnett: Without the pencil notations.

Mr. Levit: Without the pencil notations.

Mr. Barnett: I have no objection; but we are going to have to finally find out whether they are of any significance or not.

(Deposition of Anson Herrick.)

The Witness: I just looked over them and they are of no significance.

Mr. Levit: I am quite sure they are not. They appear to be mostly rings around various portions; and so, therefore, if it is agreeable, I will undertake to have this here at any time that you wish to examine it; and the reporter will copy Exhibit C for attachment to both the original and the copies of the depositions.

Mr. Barnett: Very well; and we will ask you when we take [92] Mr. Maloney's deposition to have that present.

(Document headed "In re Pickering Lumber Corporation Business Interruption Loss Insurance Claim, Notes relating to the hearing of the matter by the Appraisers," marked "Plaintiffs' Exhibit C.")

Q. (By Mr. Levit): Mr. Herrick, did you prepare a draft memorandum of the procedure to be followed in the conduct of the hearings, do you recall?      A. Yes, I do.

Q. I show you what purports to be such a document, and ask you if you prepared that in advance of the holding of the hearings?

A. I have to read it, because I have forgotten all about it.

Mr. Barnett: He did in fact read such a thing at the hearing; and asked if all of us were content with it.

(Deposition of Anson Herrick.)

Mr. Levit: Yes.

A. Yes.

Mr. Levit: Were copies of this draft furnished to and accepted by the other two appraisers?

A. I think I furnished a copy of it to Mr. Maloney; but I am quite uncertain whether I furnished a copy to Mr. Lilly.

Mr. Barnett: I will state this off the record.

(Unreported discussion.)

Q. (By Mr. Levit): Do you recall at the commencement of the first hearing that was held on the appraisal, that you read this draft memorandum in the presence of the representatives of [93] Pickering Lumber Corporation and also of the insurers, and asked if either of them had any objections to it?

A. Yes, I did.

Q. And did either of them have any objections, or express any?

A. There were no objections. There is a reference to that in the memorandum of the hearings. In fact, there is my pencil memorandum that I made—that I read that statement.

Mr. Barnett: In view of the fact that the memorandum was made at the time, which coincides with my memory, it must be right.

Mr. Levit: Which, your memory or the memorandum?

Mr. Barnett: The memorandum must be right.

A. I had completely forgotten all about it.

Q. (By Mr. Levit): Mention was made this



(Deposition of Anson Herrick.)

morning, Mr. Herrick, by Judge Barnett of the fact that the witness or testimony taken was not taken under oath. Do you recall that?

A. I recall that.

Q. Was any objection raised by either party at the hearing to the informal method of procedure that you followed in permitting the testimony to be taken without oath?

A. No objection was raised. I have forgotten whether or not the question of swearing the witnesses was raised. I have a very indistinct recollection that it was; and that it was agreed that placing them under oath was not necessary.

Q. It is true, is it not—— [94]

A. Frankly, my recollection is not clear.

Q. It is true, is it not, that had either party requested or insisted that oaths be administered, you would have so proceeded?      A. Certainly.

Mr. Levit: I think we will offer the draft memorandum of procedure to which I have referred to in evidence as Exhibit D.

(Said document entitled in part “Draft Memorandum of Procedure to be Followed in the Conduct of the Hearing,” marked “Plaintiffs’ Exhibit D.”)

Q. (By Mr. Levit): Mr. Herrick, did the appraisers in the hearing allow both parties to this appraisal to present all of the testimony that they wished to, both in oral and written form?

(Deposition of Anson Herrick.)

A. Yes.

Q. And was there any testimony of any kind that was offered rejected by the appraisers, or refused to be heard? A. No.

Q. In fact, it is true, is it not, that after the appraisal hearings were completed, the appraisers found it necessary or thought it advisable, at least, to request certain additional information from the parties; and that was done; and that information was furnished, is that correct?

A. That is correct.

Q. And it is true that no evidence or testimony or documentary proof of any kind was declined?

A. Right. [95]

Q. You mentioned Robinson, Nowell & Co. They are certified public accountants, are they not?

A. Right.

Q. And they appeared in this proceeding on behalf of Pickering Lumber Corporation?

A. Right.

Q. Mention was made of the fact that the appraisers made no independent examination of the books and original records of the Pickering Lumber Corporation. Was there any request that they do so made by either party to this proceeding?

A. I recall none.

Mr. Barnett: There wasn't any.

Q. (By Mr. Levit): Is it your recollection that it was agreed to by both parties that the data which was in the possession of the appraisers in the form

(Deposition of Anson Herrick.)

of the original claim and the various analyses by accountants on both sides, the testimony and other information given, was all that was necessary for the appraisers to consider in reaching their award?

A. Right.

Mr. Barnett: And I think it was.

A. There never was any question.

Mr. Barnett: No, nobody ever claimed that there was anything else required. Don't take this.

(Unreported discussion.)

Q. (By Mr. Levit): Mr. Herrick, I show you what purports to be a copy of a paper headed "Memorandum of general considerations relating to the settlement of the Pickering Lumber Corporation business interruption loss claim," which is dated [96] May 2nd, 1947, and which bears at the end no signature, but the initials "AH:AG"; and I will ask you if you dictated or wrote that memorandum on or about the date it bears?

Mr. Barnett: Let me have time to read this.

A. Yes, I did.

Mr. Barnett: Will you?

Mr. Levit: Surely.

Mr. Barnett: I have never seen this. We can't stop to analyze it now.

A. What is the date of it? May 2nd?

Q. (By Mr. Levit): Yes. Will you just see if that is a correct copy of that.

A. Just a minute. There is—I think I should

(Deposition of Anson Herrick.)

make some correction on here which I made in my copy afterwards. Where did you get that?

Q. I can't answer that. I found that copies in the papers that were furnished to me by the—within the last few weeks by the Fire Companies' Adjustment Bureau.

A. It must have been that Maloney turned that over.

Q. Well, that is possible.

A. Because that—that I frankly looked upon as a confidential matter among the appraisers.

Q. Well, now——

A. On the other hand, there was no secrecy, you see; but it is merely part of our deliberations.

Q. Let me ask you this, Mr. Herrick: This memorandum is [97] dated May 2nd, 1947. Do you recall whether you prepared it before or after the award was signed?      A. Oh, before.

Q. The award was signed?

A. Wait a minute. Wait a minute. When was the award signed?

Mr. Brown: Here is the award here.

Mr. Levit: I have a photostatic copy of it.

Q. I will show you a photostatic copy of the award, Mr. Herrick, in order to refresh your recollection on that.

A. Well, this was finally completed on May 3rd.

Q. At any rate, we can say now, can't we, that this memorandum dated May 2nd was prepared by you at or about the time the award was in the

(Deposition of Anson Herrick.)

process of being signed?           A. That's right.

Q. And did you furnish copies of this memorandum to Mr. Maloney and to Mr. Lilly?

A. I gave copies to Mr. Lilly and to Mr. Maloney.

Mr. Levit: We offer this memorandum in evidence as Plaintiffs' Exhibit E.

(Said memorandum consisting of three pages, dated May 2nd, 1947, marked "Plaintiffs' Exhibit E.")

Mr. Levit: For the purpose of the record, I will state that the pencil, or, rather, the pen and ink corrections or changes which appear on this typewritten Exhibit E were just made by you, Mr. Herrick, pursuant to changes which I assume you have found in your file copy.           A. That's right. [98]

Q. Do you recall when those changes were made by you with reference to the time of the making of the award?           A. No.

Mr. Barnett: Just let me ask this:

Q. Do they amount to anything? Do they change the sense of it?           A. No.

Mr. Levit: I haven't paid particular attention to them. I don't think they do.

A. No, just little changes in phraseology.

Mr. Barnett: I know. Just prettying up your own language a little bit.

The Witness: I beg your pardon?

Mr. Barnett: Just prettying up your own language a little bit?           A. Right.

(Deposition of Anson Herrick.)

Mr. Barnett: I always do, too.

Q. (By Mr. Levit): Mr. Herrick, I am going to hand you a three-page statement relating to the Pickering Lumber Corporation, and typewritten, and ask you if you can identify that, as to who made it and about when it was prepared.

A. I prepared it shortly after being appointed as appraiser, for the purpose of determining the detailed position of the differences between the insured's claim and the insurers' computation.

Q. Can you tell me whether or not this document was prepared by you before or after the hearings themselves were started?      A. Before. [99]

Q. Before they started?

A. Wait a minute. Wait a minute. Let me see this. No, after.

Q. After the hearings started?

A. After the hearings, because effect is given to the errors which were brought out—which at the hearings were brought out, and had to be made in the insured's claims, 953, not 753.

Mr. Barnett: That is all right. There was something like that. I know.

Q. (By Mr. Levit): When you speak of those errors that were made in the insured's claim, I take it that you mean that they were errors that the insured conceded at the hearing?

A. And they were very small.

Mr. Barnett: Made by counsel.

Q. (By Mr. Levit): Were copies of this, do



(Deposition of Anson Herrick.)

you recall, furnished to the parties and to the other appraisers?

A. Copies were furnished to the other appraisers; but I—I don't recall. I don't recall.

Mr. Barnett: They were not. I never saw it before.

Mr. Levit: We will——

Mr. Barnett: But I haven't objected to it.

A. It was a document prepared for the convenience of the appraisers.

Q. (By Mr. Levit): Yes. And, of course, while you probably don't recall the exact date of preparation, it is true, is it [100] not, that it was prepared a considerable period of time before the actual award was arrived at?

A. It was prepared prior to the commencement of consideration between the two appraisers.

Q. Which would have been shortly after the hearings were held?

A. Shortly after the hearings were held.

Mr. Levit: We will offer this in evidence, and ask that it be marked Exhibit F; and my suggestion would be, Mr. Hart, that this be photostated.

(Said statement consisting of three pages of typewritten matter bound in blue cover marked "Plaintiffs' Exhibit F.")

Q. (By Mr. Levit): Mr. Herrick, did you, and to your knowledge, the other appraisers, give careful and full consideration to all of the evidence, both

(Deposition of Anson Herrick.)

oral and documentary, that was produced, and to all of the contentions made on the various points in dispute by both sides before arriving at your award?

A. That was our intention; and it was believed that we did.

Q. You believed that you did? A. Yes.

Q. And you believe that the others did also, do you not? A. I can't speak for them.

Q. Well, can you express any opinion on the subject? A. Yes, my opinion is that they did.

Mr. Levit: I think that is about all.

Mr. Barnett: That is all.

/s/ ANSON HERRICK. [101]

United States of America,  
Northern District of California,  
City and County of San Francisco—ss.

I hereby certify that on the 28th day of August, 1947, at 9:30 o'clock a.m., before me, Louis Wiener, a Notary Public in and for the City and County of San Francisco, State of California, at the offices of Messrs. Severson, Brown, Keough & McCallum, Room 1004, 605 Market Street, San Francisco, California, personally appeared, pursuant to Notice of Taking Deposition, Anson Herrick, a witness called on behalf of the defendant herein; and Messrs. Long & Levit, represented by Bert W. Levit, Esquire, and David C. Bogert, Esquire, appeared as attorneys for the plaintiffs; and Messrs. Severson,

Brown, Keough & McCallum, represented by Harold Clinton Brown, Esquire, and Messrs. Watson, Ess, Barnett, Whittaker & Marshall, represented by Paul Barnett, Esquire, appeared as attorneys for the defendant; and the said Anson Herrick being by me first duly cautioned and sworn to testify the whole truth, and being carefully examined, deposed and said as appears by his deposition hereto annexed.

And I further certify that the said deposition was then and there recorded stenographically by Frank L. Hart and Harold H. Hart, competent official and disinterested shorthand reporters, appointed by me for that purpose and acting under my direction and personal supervision, and was transcribed by them.

And I further certify that at the conclusion of the taking [145] of said deposition, and when the testimony of said witness was fully transcribed, said deposition was submitted to and read by said witness and thereupon signed by him in my presence, and that the deposition is a true record of the testimony given by said witness.

And I further certify that the exhibits hereto attached and marked Defendant's Exhibits Nos. 1 to 7, inclusive, and Plaintiffs' Exhibits A to F, inclusive, respectively, are the exhibits referred to and used in connection with the deposition of said witness.

And I further certify that the said deposition has been retained by me for the purpose of securely

sealing it in an envelope and directing the same to the Clerk of the Court as required by law.

And I further certify that I am not of counsel or attorney for either or any of the parties, nor am I interested in the event of the cause; I further certify that I am not a relative or employee of or attorney or counsel for either or any of the parties, nor a relative or employee of such attorney or counsel, nor financially interested in the action.

In Testimony Whereof, I have hereunto set my hand and official seal at San Francisco, California, this 20th day of April, A.D. 1948.

[Seal]      /s/ LOUIS WIENER,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed D.C. March 17, 1948.

[Endorsed]: Filed C.C.A. March 9, 1950. [146]

In the District Court of the United States for  
the Northern District of California, Southern  
Division

No. 27,299-H

THE AMERICAN INSURANCE COMPANY, et  
al., all corporations,

Plaintiffs,

vs.

PICKERING LUMBER CORPORATION, a cor-  
poration,

Defendant.

### DEPOSITION OF LEWIS LILLY

Be It Remembered, that on Friday, the 9th day of  
April, 1948, at 2:30 o'clock p.m., pursuant to stipu-  
lation between counsel for the respective parties, at  
the office of Messrs. Severson, Brown, Keough &  
McCallum, 605 Market Street, Room 1004, San  
Francisco, California, personally appeared before  
me, Louis Wiener, a Notary Public in and for the  
City and County of San Francisco, State of Cali-  
fornia,

### LEWIS LILLY

a witness called on behalf of the defendant herein.

Messrs. Long & Levit, represented by Bert W.  
Levit, Esquire, appeared as attorneys for the plain-  
tiffs; and Messrs. Severson, Brown, Keough & Mc-  
Callum, represented by Harold Clinton Brown,  
Esquire, and Messrs. Watson, Ess, Barnett, Whit-

(Deposition of Lewis Lilly.)

taker & Marshall, represented by Paul Barnett, Esquire, [1\*] appeared as attorneys for the defendant.

The said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the above-entitled cause, did thereupon depose and say as hereinafter set forth.

It was stipulated between counsel for the respective parties that the notary public, after administering the oath to the witness, need not remain further during the taking of this deposition.

It was further stipulated that the said deposition should be recorded stenographically by Harold H. Hart, a competent official shorthand reporter and a disinterested person, and thereafter transcribed by him into longhand typewriting, to be read to or by the said witness, who, after making such corrections therein as may be necessary, will subscribe the same.

It was further stipulated that all objections to questions propounded to the said witness shall be reserved by each of the parties, save and except any objections as to the form of the questions propounded. [2]

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\* Page numbering appearing at top of page of original Reporter's Transcript of Record.



LEWIS LILLY

called as a witness on behalf of the defendant, being first duly cautioned and sworn by the notary public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

By Mr. Barnett:

Q. Mr. Lilly, this is a continuation of a deposition in the case of The American Insurance Company and others against Pickering Lumber Corporation, No. 27,299-H, what was begun on the 20th day of August, 1947, at which time you were sworn as a witness; and this is a mere continuation of that deposition.

A. I see. Well, you know the date. I haven't any record of it.

Q. I was just referring to it.

A. You have the record there.

Q. Mr. Lilly, were you the umpire chosen by Mr. Anson Herrick and Mr. Maloney to appraise the loss under the use and occupancy insurance policies which were presented under the proof of claim of the Pickering Lumber Corporation?

A. I was.

Q. Do you remember the first meeting of the appraisers and the umpire?

A. In all fairness, not particularly.

Q. All right. I am glad to refresh your recollection. [3] Do you remember that you sat with

(Deposition of Lewis Lilly.)

the two appraisers when the parties were permitted to come before you and to present their claims and their evidence?      A. Yes.

Q. Do you remember that?

A. I remember that.

Q. Do you know where it occurred?

A. As I recall, in the office of Orrick, et al.

Q. In the Financial Center Building, in San Francisco?

A. In the Financial Center Building.

Q. All right. Now, later the appraisers made an award, and sent it to you, and you signed with them? Do you remember that?

A. I remember signing the award.

Q. Now, being the umpire, I assume that you did not take part in arriving at the decision unless you were called upon to do so by the appraisers? Is that right?

A. Substantially, yes; but let me qualify that answer by saying that at the start certain, shall we say proceedings, were held in my—were held in my office. Now, I don't remember which ones specifically, but there were matters that came up; and some of them were discussed about which there had been no difference of opinion as between the two different appraisers.

Q. In other words, you were a member of the board, and you were in their confidence; and there was no reason to keep any secrets from you?

A. I assume that to be true, sir.

(Deposition of Lewis Lilly.)

Q. They did have some differences that were submitted [4] to you?

A. Yes, as I recall, there were possibly one or two differences.

Q. Do you remember what they were?

A. May I just refer to a memorandum here?

Q. Any way that will be the easiest for you, Mr. Lilly.

A. Because I have no record of it. I think specifically that one of the questions submitted was the value of the lumber coming into the box mill. Let me say for the record, I have not seen this record, nor have I consulted anyone in any way since I was telephoned by Mr. Brown the other day; and I am speaking of my memory.

Q. Let me state this: I am not trying to catch you; and I want to say this: If there is anything I have that may help you, that you want to look at, you can see anything I have if it will be of help.

A. No. Well, all right. But I mean I want to say that I am being hesitant only in so far as my memory——

Q. Requires?

A. Well, my memory permits. And I think there was the one question there that had to do with the value of the material going into the box mill; and I think the other one had to do with the stumpage, the price of stumpage.

Q. Do you remember what the difference of opin-

(Deposition of Lewis Lilly.)

ion was on the cost of lumber going into the box factory?

A. You mean as to the exact figure, sir?

Q. No. A. No, I don't. [5]

Q. In principle, what was the difference between them?

A. In principle, the question was as to whether the value as—I think I am stating this correctly—the value as asserted by the company should be used, or whether the value should be determined by the OPA market price plus their freight differential. Now, that is as I recall it.

Q. Well, now, I am not trying to get you to give an answer. A. No.

Q. I am just telling you this. Mr. Maloney suggested that he disagreed with Mr. Herrick as to whether or not the freight—the freight differential should be considered in the OPA ceiling price. Do you remember anything about that?

A. Yes. As I recall it, there had been some differences of opinion as to that; and, as I recall, there was a differential finally arrived at.

Q. Who decided that?

A. Well, I suppose—as near as I can recall, perhaps I had to decide it.

Q. You were the one that decided on the freight differential?

A. Well, let me put it—whether I decided or not, I at least had a view on the subject.

(Deposition of Lewis Lilly.)

Q. You don't know whether you outvoted him two to one, or you decided that?

A. No, I wouldn't say. At least, there was an agreement on it at the finish. [6]

Q. (By Mr. Levit): Among all three of you?

A. Yes. Oh, yes, the three of us.

Q. (By Mr. Barnett): That was on the price of lumber going to the box factory. The other was the price of stumpage. By "stumpage," I understand you to mean standing lumber?

A. In the normally accepted sense of the word, yes.

Q. I am trying to put it simply. A. Yes.

Q. Do you remember what that disagreement was?

A. No, I am not so clear. I am not clear as to that. As I recall, we—it rather comes back to me that it was \$2.65 a thousand.

Q. That was upon the Pickering claim; but they ended up with more than that, I think, which was——

Mr. Momyer: I think that was finally used.

Q. (By Mr. Barnett): Oh, \$2.65?

Mr. Momyer: \$2.65 was finally used.

Q. (By Mr. Momyer): What was it that Pickering claimed?

Mr. Momyer: That was what we claimed to be the cost of the stumpage.

Mr. Barnett: Oh, yes.

A. Now, that is the best of my memory, sir.

(Deposition of Lewis Lilly.)

\$2.65 was the figure arrived at. You needn't put this down in the record, but the record will check me on that.

Q. (By Mr. Barnett): Do you remember what the other theory was as to what it should be?

A. No, sir, I don't.

Q. Do you know that was referred to?

A. Yes, that's right. [7]

Q. Were there any other points that were referred to you, Mr. Lilly?

Mr. Levit: If you recall.

Mr. Barnett: Of course, if he recalls.

A. I don't know that there were any points in which there was a complete cleavage of opinion between the two that were referred to me. I think I acquiesced in the others probably there. For example, that allowance on the claim for log stain and excessive logging costs, I think I was in agreement with what—what was that?—\$25,000.00 figure that we had there.

Mr. Levit: That is right.

A. I think that was the one.

Q. (By Mr. Barnett): That is what it was?

A. Yes.

Q. Do you know how that was arrived at?

A. I can't give you the makeup of that. No, that was a decision based on the equities as I saw them.

Q. But you don't remember how you arrived at it?



(Deposition of Lewis Lilly.)

A. I don't remember how I—of course, I didn't keep a record of—this is off the record, but the record was being kept by the two appraisers in the case, and I didn't keep any.

Q. You made no attempt to?

A. I didn't keep an independent record, no.

Q. You went on the theory that unless you were consulted, it wasn't your business?

A. Oh, just a matter of general interest, of course. [8]

Q. Well, now, there seems to have been three figures, as far as I can find out that were involved in that \$25,000.00: One was excessive logging costs, which Pickering showed in its claim as \$42,797.04; log stain and rot and checking, which was in the sum of \$36,149.95; and log decking in the sum of \$12,492.35.

A. Roughly about \$90,000.00, is it?

Q. I haven't figured it up to get the amount.

A. I just added it in my head as you went along.

Q. I will have to add it up for you.

Mr. Levit: Something over ninety thousand.

A. I was adding it as you went along. That is roughly ninety thousand?

Mr. Barnett: Roughly ninety-one and a half thousand, as I get it.

A. I just added it by thousands as you went along.

Q. All right. Those were the three items that

(Deposition of Lewis Lilly.)

you arrived at the twenty-five thousand, is that right?

A. I imagine those were the items included.

Q. Were you in on that decision?

A. I don't think that I was—that there was a final joining of issue. I think that was agreed upon by the—I am speaking from memory—I think the appraisers agreed on that figure; and it was agreeable to me.

Q. And you acquiesced in it?

A. I was there while they were arguing it; and whether I [9] was brought into the discussion or not, sir, I can't answer.

Q. As to whether or not they couldn't agree, and had you decide that, you don't remember that?

A. I don't recall. I think that was one of the points that was mentioned.

Q. You don't recall that?

A. I don't recall.

Q. You think they worked that out between themselves?

A. To the best of my knowledge, that was it, yes.

Q. Were you consulted about adding \$15,095.00 to the continuing expense for the year which was the depreciation of the mills that burned down—it would have been the depreciation in that year? Do you remember whether you consulted with them, or did they have any talk with you about that?

A. Not that I recall. I don't think I was asked to—to the best of my knowledge and memory, and I

(Deposition of Lewis Lilly.)

don't recall that there was a difference—that there was an issue joined on that.

Q. You don't think they did on that?

A. I don't think they called on me for a decision on that at all.

Q. Well, I imagine now from what Mr. Maloney said—I want to hear what you say.

A. Now, you know, and you must remember that I am always working from a memory.

Q. I understand that, Mr. Lilly, as well as you do; and I am trying—— [10]

A. I want you to understand that I am not trying to give any testimony that is not factual, or that I don't know.

Q. I am sure of that; but I am also sure that a man can only say what his memory prompts him to say.

A. That is it precisely.

Q. We are not going to have any trouble here, Mr. Lilly, at all.

You were talking about that \$25,000.00. I didn't get whether you said they worked out the \$25,000.00 figure themselves, or whether you voted on that.

Mr. Levit: He couldn't remember. He acquiesced in it, and he was in on the discussion, as I recall.

A. I don't remember that there was any impasse there at all.

Q. (By Mr. Barnett): You don't remember that they had called on you to decide the differences?

A. I don't—I don't think they did. I don't think so. I may have had part in the general discussion.

(Deposition of Lewis Lilly.)

Q. I understand that they didn't keep any secrets from you.

A. Oh, no. Both were very frank about it. Neither secrets nor views, if I may put it.

Q. If you heard the discussion, do you know what the objection was to the 42,797.04 as excessive logging costs?

A. I don't, sir.

Q. You don't know what the objection was?

A. I don't recall that, no. [11]

Q. Do you remember the evidence concerning the log stain and the rot and the end checks that was made by a man from the lumber association in making a test run, and then by Mr. Thomas making estimates of it that would have occurred within the nine months and within the year—that would have occurred within that time? Do you remember that evidence?

A. I remember the discussion. I remember the point being raised in a general way. Now, what—beyond that, sir, I can't say.

Q. You don't know what objections were made at the time to it?

A. Whether it was excessive or not, I can't recall at this time, what the discussion was.

Q. Do you remember what discussion or objection there was to the log decking in the amount of \$12,492.35?

A. No, I can't answer that.

Q. As I understand it, you can't even remember that you had to decide how much should be allowed for those claims?

(Deposition of Lewis Lilly.)

A. That is just quite correct. I can't say that that was submitted to me specifically. It may have been in order to reach an agreement in regard to it.

Q. But you can't remember that?

A. I can't say exactly that that was submitted, no. That is, with the definite assurance that I would be stating a fact.

Q. Do you remember whether there was any other disagreement about using OPA ceiling prices to determine the cost of [12] lumber used in the box factory—whether the freight differential should be considered?

A. I think there were two views there, as I recall; Mr. Herrick had one view, and asserted one view to the effect that he thought the material being there should carry a higher price than OPA price; and Mr. Maloney said——

Q. Yes.

A. (Continuing): ——I think took the opposite viewpoint, that the OPA price was the price to be used.

Q. Do you recall in regard to that, making the decision?

A. I think I acquiesced in the decision of the OPA price plus the agreed upon freight differential. I think that freight differential was Fresno and Merced or Fresno and Modesto; I can't tell which.

Q. I don't care about that. We can find out what that is. I am trying to find what the difference of the viewpoints was.

(Deposition of Lewis Lilly.)

A. Yes. Well, I think that I have stated it as clearly as I can. The OPA price in one instance; and, as I recall, Mr. Herrick's contention for a higher price.

Q. Is it your recollection that you agreed with Mr. Herrick on that?

A. No, I agreed, I think—I think I agreed with Mr. Maloney on the OPA price. Now, I don't know whether Maloney asserted the OPA price, but I think it was—yes, it was the OPA price, as I recall it, that was later determined upon, wasn't it?

Q. It was what? [13]

A. It was the OPA price that was used, plus the freight differential, as I recall.

Q. Yes. Mr. Herrick said that he was in favor of adding the freight differential.

A. It could be. It could be.

Q. But you think that you decided on adding the freight differential?

A. I think I asserted the equity of the freight differential in that matter, yes.

Q. Do you remember of anything else where you were called upon to cast the deciding vote besides that, as to whether the freight differential should be added to the OPA ceiling price?

A. No, I don't. I don't.

Q. You think, as far as you now remember, that they fought it out themselves, and came to the agreement without requiring you to cast the deciding vote?



(Deposition of Lewis Lilly.)

A. Yes. I thought to a remarkable degree they got their viewpoints straightened out.

Mr. Barnett: I think that is all I want to know here. I am not trying to catch you. I just want to get what the facts are.

(Unreported discussion.)

Q. (By Mr. Levit): Mr. Lilly, you testified, I believe, that you have not at this time and did not keep even at the time of [14] the appraisal, any record of what occurred or what the submissions were, or what their differences were?

A. No. My sole record was the time charge for my office.

Q. And it is a fact, isn't it, Mr. Lilly, that as to the details of what took place, who made which contention, and what exactly you were called on to decide, that those things are very hazy in your memory at this time? A. Yes, yes.

Q. Now, at the same time, Mr. Lilly, you do recall, do you, that you did participate in the consideration of the entire matter? A. Yes.

Q. And you did sign the award?

A. I think I did.

Q. In fact, when you signed the award, and at the present time, you consider and do consider that the award was a fair and an equitable one, is that right?

A. I subscribed to the findings; and that is implied.

(Deposition of Lewis Lilly.)

Q. That is still your opinion, is it not?

A. Yes. I have no reason to change it.

Q. Mr. Lilly, Judge Barnett called your attention to certain statements made by Mr. Maloney. I am going to call your attention to a statement or statements made by Mr. Herrick that are part of his deposition, and a part of a letter which he addressed to Judge Barnett under date of March 1st, 1948. I am referring to Plaintiffs' Exhibit B attached to Mr. Herrick's deposition.

Mr. Barnett: His recent letter? [15]

Mr. Levit: What is that?

Mr. Barnett: His recent letter?

Mr. Levit: Yes.

Mr. Barnett: I remember it.

Q. (By Mr. Levit): You recall, Mr. Lilly, do you not, the contention of the Pickering Lumber Company in regard to the profits of the box factory was that the lumber used in the operation should be charged in at their average cost of producing all of their lumber. Do you recall that?

A. I would have to answer that this way: That if Mr. Herrick so testified, it would have been his contention.

Q. That was the Pickering Lumber Company's contention.

A. I say if Mr. Herrick so testified, that would have been the Pickering Lumber Company's contention.

Q. Yes. Now, I am going to read you a state-

(Deposition of Lewis Lilly.)

ment from Mr. Herrick's letter appearing on page 110 of his deposition, in which he states in the letter to Judge Barnett:

"I believe your contention that the profit of the box factory after the fire should be based upon the average cost of all lumber produced is erroneous, without any foundation in accounting . . ."

Do you agree with that?

A. My answer would be that I don't know that it is particularly a matter of accounting as much as it is of equity.

Q. But you agree with that conclusion?

A. That it is a matter of accounting? [16]

Q. No, I say, do you agree with that conclusion, that it is erroneous; that the method of computing the profit is erroneous?

A. I would say to you that it was not the method to be applied under the circumstances.

Q. Yes.

A. As indicated by subsequent findings which were—in which the OPA price plus the freight differential was involved.

Mr. Levit: Yes. That is all.

Mr. Barnett: I assume you wouldn't have signed it unless you agreed to it. I have been assuming that. That is all.

/s/ LEWIS LILLY. [17]

United States of America,  
City and County of San Francisco,  
Northern District of California—ss.

I hereby certify that on the 9th day of April, 1948, at 2:30 o'clock p.m., before me, Louis Wiener, a Notary Public in and for the City and County of San Francisco, State of California, at the offices of Messrs. Severson, Brown, Keough & McCallum, 605 Market Street, Room 1004, San Francisco, California, personally appeared, pursuant to stipulation between counsel for the respective parties, Lewis Lilly, a witness called on behalf of the defendant herein; and Messrs. Long & Levit, represented by Bert W. Levit, Esquire, appeared as attorneys for the plaintiffs, and Messrs. Severson, Brown, Keough & McCallum, represented by Harold Clinton Brown, Esquire, and Messrs. Watson, Ess, Barnett, Whitaker & Marshall, represented by Paul Barnett, Esquire, appeared as attorneys for the defendant; and the said Lewis Lilly being by me first duly cautioned and sworn to testify the whole truth, and being carefully examined, deposed and said as appears by his deposition hereto annexed.

And I further certify that the said deposition was then and there recorded stenographically by Harold H. Hart, a competent official and disinterested shorthand reporter, appointed by me for that purpose and acting under my direction and personal supervision, and was transcribed by him.

And I further certify that at the conclusion of

the taking of said deposition, and when the testimony of said witness was [18] fully transcribed, said deposition was submitted to and read by said witness and thereupon signed by him in my presence, and that the deposition is a true record of the testimony given by said witness.

And I further certify that the said deposition has been retained by me for the purpose of securely sealing it in an envelope and directing the same to the clerk of the court as required by law.

And I further certify that I am not of counsel or attorney for either or any of the parties, nor am I interested in the event of the cause; I further certify that I am not a relative or employee of or attorney or counsel for either or any of the parties, nor a relative or employee of such attorney or counsel, nor financially interested in the action.

In Testimony Whereof, I have hereunto set my hand and official seal at the City and County of San Francisco, State of California, this 17th day of April, A.D. 1948.

[Seal]      /s/ LOUIS WIENER,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed D.C. April 20, 1948.

[Endorsed]: Filed C.C.A. March 9, 1950. [19]

In the District Court of the United States for  
the Northern District of California, Southern  
Division

No. 27,299-H

THE AMERICAN INSURANCE COMPANY, et  
al., all corporations,

Plaintiffs,

vs.

PICKERING LUMBER CORPORATION, a cor-  
poration,

Defendant.

### DEPOSITION OF FRANK MALONEY

Be It Remembered, that on Friday, the 9th day  
of April, 1948, at 9:00 o'clock a.m., pursuant to  
stipulation between counsel for the respective par-  
ties, at the offices of Messrs. Severson, Brown,  
Keough & McCallum, 605 Market Street, Room 1004,  
San Francisco, California, personally appeared be-  
fore me, Agnes C. Otto, a Notary Public in and for  
the City and County of San Francisco, State of  
California,

### FRANK MALONEY

a witness called on behalf of the defendant herein.

Messrs. Long & Levit, represented by Bert W.  
Levit, Esquire, appeared as attorneys for the plain-  
tiffs; and Messrs. Severson, Brown, Keough & Mc-  
Callum, represented by Harold Clinton Brown, Es-



(Deposition of Frank Maloney.)

quire, and Messrs. Watson, Ess, Barnett, Whittaker & Marshall, represented by Paul Barnett, Esquire, appeared as attorneys for the defendant.

The said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the above-entitled cause, did thereupon depose and say as hereinafter set forth.

It was stipulated between counsel for the respective parties that the notary public, after administering the oath to the witness, need not remain further during the taking of this deposition.

It was further stipulated that the said deposition should be recorded stenographically by Harold H. Hart, a competent official shorthand reporter and a disinterested person, and thereafter transcribed by him into longhand typewriting, to be read to or by the said witness, who, after making such corrections therein as may be necessary, will subscribe the same.

It was further stipulated that all objections to questions propounded to the said witness shall be reserved by each of the parties, save and except any objections as to the form of the questions propounded.

Mr. Barnett: Is it necessary to have a stipulation to allow the notary to depart unless needed, or——

Mr. Levit: We will stipulate to that.

Mr. Barnett: All right; but if you want her to remain.

(Deposition of Frank Maloney.)

Mr. Levit: That is all right.

Mr. Barnett: Well, you dictate the stipulation.

Mr. Levit: Well, simply that we will stipulate that the notary may be excused.

Mr. Barnett: All right.

Mr. Levit: We will also, I presume, proceed on the assumption that all objections, except as to the form of the question, are reserved to be made at the time of trial.

Mr. Barnett: Yes.

### FRANK MALONEY

called as a witness on behalf of the defendant, being first duly cautioned and sworn by the notary public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

By Mr. Barnett:

Q. What is your name?

A. Frank Maloney.

Q. Where do you live, Mr. Maloney?

A. I live in Sacramento.

Q. What is your business?

A. Building contractor.

Q. Were you one of the appraisers who was appointed to appraise the Pickering Lumber Company's use and occupancy claim under the insurance policies issued by The American Insurance Company; Atlas Assurance Company Limited; Cale-

(Deposition of Frank Maloney.)

donian Insurance Company; The Camden Fire Insurance Association; Columbia [3] Insurance Company of New York; Commercial Union Assurance Company, Limited; The Continental Insurance Company; Fire Association of Philadelphia; Fireman's Fund Insurance Company; Firemen's Insurance Company of Newark, New Jersey; Glens Falls Insurance Company; Globe and Rutgers Fire Insurance Company; Great American Insurance Company; The Hanover Fire Insurance Company; Hartford Fire Insurance Company; The Home Insurance Company; Insurance Company of North Amercia; National Fire Insurance Company of Hartford; National Liberty Insurance Company of America; National Union Fire Insurance Company of Pittsburgh, Pa.; New Hampshire Fire Insurance Company; New York Underwriters Insurance Company; New Zealand Insurance Company, Limited; The Northen Assurance Company Limited; Norwich Union Fire Insurance Society Limited; Pearl Assurance Company, Limited; The Pennsylvania Fire Insurance Company; Queen Insurance Company of America; St. Paul Fire & Marine Insurance Company; Scottish Union and National Insurance Company; Security Insurance Company of New Haven; Springfield Fire and Marine Insurance Company; The Travelers Fire Insurance Company; United States Fire Insurance Company; Westchester Fire Insurance Company; and The Western Assurance Company?

(Deposition of Frank Maloney.)

A. I believe that is correct.

Q. By whom were you appointed?

A. The Fire Companies' Adjustment Bureau.

Q. In other words, by the companies?

A. Correct. [4]

Q. Insurance companies, I mean.

A. Right.

Q. And who was the appraiser appointed by Pickering?      A. Mr. Anson Herrick.

Q. And you two appointed an umpire?

A. Mr. Lilly; Lewis Lilly.

Q. Mr. Lilly?      A. Lewis Lilly, yes.

Q. I am going to show you an instrument set forth beginning on page 106 of the deposition of Mr. Anson Herrick, and ask you if that is a true copy of the award returned. (Document shown to witness.)

A. To the best of my knowledge, I think it is.

Q. Do you see anything in substance different from what you remember?

A. No, I believe that is correct.

Q. Mr. Maloney, do you remember whether or not the appraisers held a hearing before they returned an award?

A. They had a—heled a hearing?

Q. Yes.

A. I don't understand that question.

Q. All right. I will put it some other way. Do you remember that before you made the award, whether or not you gave notice to the Pickering

(Deposition of Frank Maloney.)

Lumber Company and to the adjuster representing the insurance companies that you were going to have the hearing and were going to allow them to appear before you and present their claim?

A. You mean at the end of our work?

Q. No, at the beginning of your work.

A. Oh, yes. [5]

Q. That was held where?

A. I believe that meeting was held in Mr. Herrick's office.

Q. I believe it was, too. At that time——

A. It could have been at Mr. Lilly's office.

Mr. Momyer: In Mr. Herrington's office.

Mr. Levit: You mean at Orrick's office?

Mr. Momyer: Yes, at Herrick's office.

A. I think that was when we were going to send out a notice, and we wanted to notify both sides; and I believe that was at Mr. Herrick's office, to the best of my knowledge.

Q. (By Mr. Barnett): I want you to take this seriously. Now, my object here is not to confuse you; it is just the opposite. Let me ask you a few questions.

Do you remember that it was in a long conference room with a long conference table?

Mr. Levit: Well, it is obvious to me, Judge Barnett, from Mr. Maloney's statement, that he misunderstood your question. He thought you were referring to the meeting of the appraisers themselves, in which they decided to make the award.



(Deposition of Frank Maloney.)

Q. (By Mr. Barnett): I don't want him to misunderstand me.

A. I did misunderstand you, to what you have reference.

Q. All right. That is just what I want to avoid; and if at any time you do, you tell me so. I am trying to find out whether you first gave a notice to the people that they could—for them to appear and present their claims before you. [6]

A. I will answer that, yes, with this explanation: Mr. Herrick and I met; we selected the umpire; then Mr. Herrick notified the Pickering people, and I notified the Fire Companies' Adjustment Bureau. Mr. Herrick, being in San Francisco, made arrangements for both parties for the time and place of the meeting. He might have notified me either by phone or by letter, as to an agreeable date. So then the dates were set for both parties to appear at this meeting at this attorney's where we had our first meeting.

Q. That is what I am talking about, when the various parties appeared at that meeting at the attorney's office. Do you remember where that was?

A. Well, I have forgotten the attorney's name at this time.

Q. It was in an attorney's office in San Francisco?     A. That's right.

Q. (By Mr. Levit): It was one of the attorneys for Pickering, wasn't it?

A. Oh, yes, the Pickering attorney. That is where the meeting was held.



(Deposition of Frank Maloney.)

Q. (By Mr. Barnett): Well, I may just satisfy your curiosity there. It was in the office of Messrs. Orrick, Dahlquist and so forth, in the Financial Center Building.

A. That's correct.

Q. At that meeting, did the parties present what they had to say?

A. Both parties presented their evidence of those things that we were there for, yes. [7]

Q. Were the witnesses sworn?

A. They were not.

Q. Do you remember whether both parties filed the figures that they claimed they depended upon?

A. They did.

Mr. Levit: What is the answer?

(Answer read by reporter.)

Q. (By Mr. Barnett): Would you recognize them if you saw them?

A. I feel sure I would.

Mr. Barnett: Let me have our proof of claim.

(Unreported discussion.)

Q. (By Mr. Barnett): Except for notations in pencil and in ink, do you recognize that as a true copy of the proof of claim?

Mr. Levit: We will stipulate that is a copy of the proof of claim filed by Pickering.

Mr. Barnett: Except for the notations thereon in pencil and ink.

Mr. Levit: Do you plan to put this in evidence?

Mr. Barnett: No, I don't.

Mr. Levit: Then why worry about the notations?

Mr. Barnett: Well, because I don't want to have

(Deposition of Frank Maloney.)

an argument with the witness explaining to him all around.

Mr. Levit: All right.

Q. (By Mr. Barnett): Do you recognize this that I hand you as a true copy of the proof of claim that was filed by Pickering Lumber Corporation and that was presented to the [8] appraisers when they held their hearing? A. I do.

Mr. Levit: May we have that marked for identification, as long as we have referred to it? I am not suggesting that it be attached to the deposition, but let it be marked for identification.

Mr. Barnett: I wish you would mark that:

(Proof of claim marked Defendant (Maloney) Exhibit 1 for Identification.)

Mr. Barnett: I am not going to introduce what I just showed you, Mr. Maloney, because it is not necessary to do so; it has been marked and attached to Mr. Herrick's deposition. I am just trying to see that we all know what we are talking about.

Do you remember who the accountant for the insurance companies was in that hearing?

A. Mr. Baker.

Q. I will show you a set of figures, and ask you if that is what Mr. Baker presented to the appraisers. (Document shown to witness.)

A. Yes, I think it is.

Mr. Levit: Well, this should have been attached to the original deposition of Herrick.

Mr. Barnett: Mr. Herrick made us promise to

(Deposition of Frank Maloney.)

give this back, and we agreed to put in a photostat.

Mr. Levit: You photostated it? [9]

Mr. Barnett: We have got to return it to him.

Mr. Levit: I see.

Mr. Barnett: Don't you remember?

Mr. Levit: I see.

Mr. Barnett: Mr. Herrick didn't want to permanently release any of his papers, and we agreed to photostat it.

Q. Is that it, Mr. Maloney, what I just showed you? A. Yes.

Mr. Barnett: Mark that, will you?

Mr. Levit: It is already marked. I suggest that you refer to it by the former mark.

Mr. Barnett: All right. It bears the identification "Defendant's Exhibit 3."

Mr. Levit: And was so marked on Mr. Herrick's deposition.

Mr. Barnett: It was so marked when it was put in evidence in Mr. Herrick's deposition.

Q. Are those two sets of figures, the figures that the appraisers used in arriving at their result?

A. Yes.

Q. Did you ever actually examine the books of Pickering Lumber Corporation?

A. Not thoroughly, no.

Q. Well, did you ever go down there at all?

A. The only reference we had with Pickering Lumber Corporation, I recall Mr.—the bookkeeper that was there—what was his name?

(Deposition of Frank Maloney.)

Mr. Barnett: Mr. Momyer?

Mr. Momyer: Mr. Lucas. [10]

A. Mr. Lucas. From time to time Mr. Herrick would call him for information in regard to the books; and a time or two—I don't know how many times—we had him over at the hearings.

Q. (By Mr. Barnett): But I mean you didn't actually get the actual books of Pickering Lumber Corporation, either down at Standard, California, or have them sent up here?

A. No, not to my knowledge.

Q. Except to the extent that you called upon them for the frequent additional information, you went on these figures? A. That's right.

Q. Do you remember that——

Mr. Levit: Pardon me, Judge. Do you have in mind that there were certain other analyses of the figures presented by a firm of accountants, Nowell——

Mr. Barnett: Yes, but I don't know what they furnished them; but I know they called me, and I told them to give them whatever they asked for.

Mr. Levit: And that those were in addition to the matters which you mentioned?

Mr. Barnett: They both told me so. I have not seen them.

Mr. Levit: Yes. Nowell Robinson was the name.

Mr. Momyer: Robinson, Nowell.

Mr. Brown: Lucas is with Nowell.

Mr. Levit: I see. I didn't realize that.

(Deposition of Frank Maloney.)

The Witness: He is with them. [11]

Mr. Barnett: I will say this: That we will get it for you and furnish it if you want it.

Mr. Levit: No, no. I remember that from Mr. Herrick's testimony; and I thought perhaps you had neglected to mention it; but if Lucas was with them, why, that takes care of it.

Mr. Barnett: He was the man. That is an accounting firm, you know.

Mr. Levit: Yes.

Q. (By Mr. Barnett): I will ask you if you remember, there was no actual difference in the actual figures taken from the books in either those presented by Pickering in its proof of loss or in Baker's, is that right? It was a difference in handling?

A. Just the difference in setup primarily.

Q. That is, they came to different conclusions?

A. Yes.

Q. But there was no dispute about the accuracy of the figures they used? They used the same figures, did they not?

A. I feel sure that they did.

Q. Was that the reason that you did not believe it necessary to go and examine Pickering's books?

A. That's right.

Q. All right. I will again show you this statement gotten up by Mr. Herrick, and purporting to show what the appraisers did in arriving at their result—and I will ask this be marked Defendant's Exhibit 1. [12]



(Deposition of Frank Maloney.)

Mr. Levit: For the purpose of the record, I would like to identify this as being the same as Defendant's Exhibit 7 on Mr. Herrick's deposition.

Mr. Barnett: That is what it is.

Mr. Levit: And I believe that in the course of the discussion of that exhibit, the pages were numbered. I was trying to find the reference in here of the numbering of those pages. Yes. Let's number them as we did on page 60 of Mr. Herrick's deposition. May I suggest that we number the pages in this exhibit, page 1 to be the page headed "Finally Revised Computation"; page No. 2 being the page headed "Box Factory 'Salvage' Statement"; No. 3, the page headed "Reconcilement of Insurable Value and Loss and Claimed with Appraisal"; and page No. 4 headed on the left "Composition of appraisal changes."

Mr. Barnett: That is entirely satisfactory. That is the way it appeared in Mr. Herrick's deposition.

(Said document entitled "In re Pickering Lumber Corporation, B. I. Loss Claim, Finally Revised Computation," marked Defendant's Exhibit 1 (Maloney).)

Q. (By Mr. Barnett): I notice on this statement on page 4, in stating the continuing costs for the year, appears item No. 2, which reads as follows: "Depreciation on destroyed property omitted in error from claim, \$15,042.00." I will show it to you. Right at the top, item 2.



(Deposition of Frank Maloney.)

A. I remember discussion about it; but I cant' remember [13] all of this sheet at all. I haven't even gone into it.

Q. No, you told me you hadn't; but I just want to call your attention to that. A. Yes.

Q. Do you remember that adding—in calculating for the year the continuing costs, adding this \$15,-042.00 as representing depreciation on the sawmill.

A. I remember the discussion, and it was something that Mr. Herrick had found in their books. He contacted this Mr. Lucas in regard to it; and I told him if he was going to talk to Lucas about it, I would like to have him also talk to Mr. Baker on the matter, which he did; and it was apparently all right from a bookkeeper's standpoint; and I acquiesced, because Mr. Lilly and Mr. Herrick worked these figures out. I did not.

Q. All right. Well, then, is all that you know about that fifteen thousand is that both the bookkeepers thought it ought to be out; and therefore you agreed? Is that all you know about it?

A. Yes, that is all I can remember in regard to that point.

Q. You considered it an accounting problem?

A. I did. It was over my head a mile.

Q. All right. Now, according to these figures as I find them, the Pickering Lumber Corporation in its proof of claim, claims as continuing costs excessive logging costs in the sum of \$42,797.04. Do you remember about that? A. I do. [14]

(Deposition of Frank Maloney.)

Q. I don't mean do you remember that exact figure.      A. No, I remember.

Q. I assume you don't.

A. I remember the excess logging costs.

Q. And that figure doesn't seem to be out of line, according to your memory?

A. No, it is pretty close.

Q. Do you remember what was done with that; whether it was allowed or not?

A. No, not—as a single individual item, it was not.

Q. Do you remember why it was not?

A. There was a great deal of discussion in regard to the excessive logging costs; and the values to them; and that there should be some recovery, but they would be benefitted by it in the longer run.

Q. Do you remember why it was disallowed?

A. It wasn't disallowed. It was considered. Now, we went into that matter along with the entire page.

Q. Take your time. I know how hard this is.

A. Well, it isn't hard.

Q. I mean to find things, and things like that. I have the same trouble.

Mr. Levit: Let the record show that the witness is examining the first page of Defendant's Exhibit 3 attached to Mr. Herrick's deposition.

A. We had this individual sheet up for discussion.

Q. (By Mr. Barnett): Do you mind calling out the figures used, [15] so we will know what figures

(Deposition of Frank Maloney.)

they are?           A. Do you mean the entire setup?

Excessive logging costs .....	\$42,797.04
Grazing rentals .....	1,461.81
Log stain .....	36,149.95
Log Decking .....	12,492.35
Blow Pipe .....	908.80
Moving Lumber .....	817.14
Sticker and Yard Clean-up .....	4,309.70
Tax, etc. ....	400.00

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A total of .....\$96,413.17

Q. (By Mr. Barnett): Well, now, on the side there, in Mr. Lilly's handwriting, there he says——

Mr. Levitt: In whose handwriting?

Q. (By Mr. Barnett): I mean Mr. Herrick's handwriting, he says \$25,000.00. Do you know what that means?

A. That means that we allowed \$25,000.00 for the first 4 items on the sheet, minus grazing rental, which we did not penalize them on, as I remember.

Q. You just threw it out?

A. Well, we took care of that in another manner; he did in his bookkeeping. Mr. Lilly and he subtracted that from that total figure; and then they went to work with their slip sheets again—they had sheets of paper everywhere, as you can understand—and made our build-up as we went along.

Q. As I understand, then, leaving out the grazing rentals, [16] why, you allowed \$25,000.00 on account

(Deposition of Frank Maloney.)

of Pickering's claim for excessive logging costs, log stain, and log decking?      A. Yes.

Q. Do you remember what the argument was about it?

A. It was a question of our best judgment, taking into consideration the testimony as we heard it; betterments which might be acquired; the longer run at the mill, they would naturally get appreciation or something from having these excess logs. The question was as to the actual loss in regard to the stain over a nine-months period. There was many factors involved, and they were all considered; and there was a lot of time put in on that page. It wasn't a—it wasn't just a snap shot of \$25,000.00 by no means. It was considered from all angles to our best judgment; and that was the fair amount for that particular item.

Q. Then you didn't throw out excessive logging costs?      A. No.

Q. Nor the log stain?      A. No.

Q. Nor the log decking?      A. No.

Q. Do you remember whether or not you tried to determine how much log stain they had suffered?

A. Well, we had evidence presented by two different parties at the original hearing as to what they claimed the log stain amounted to.

Q. Do you remember whether or not the appraisers accepted that estimate from those experts?

A. I personally didn't accept it. I thought it was

(Deposition of Frank Maloney.)

excessive. I have forgotten what Mr. Lilly's opinion was on it.

Q. About that figure of \$42,797.04 for excessive logging costs, did the appraisers accept that figure? I am not talking about accepting it as to whether they were entitled to recover it, but as to——

A. You mean accept the whole \$42,000.00 figure?

Q. I mean, did they accept it that that was actually the loss? I am not talking about whether you thought they should actually recover that, but did they accept that figure?

A. Well, I couldn't truthfully remember that. That is the first item on there, isn't it?

Q. Yes, and I know this is hard. Take your time, Mr. Maloney.

Mr. Levit: If you are not sure, say so.

A. No, I am not sure. I really am not. No, I really am not sure.

Q. (By Mr. Barnett): All right. But you are sure that you didn't accept the figure of \$36,149.95 as the amount of the log stain?

A. That I did not. Correct.

Q. Do you remember about the log decking, whether or not the appraisers accepted the figure of \$12,492.35 as the cost of the log decking?

A. I will answer that in this manner, that we took into consideration, in our best judgment, the extra logs that they would have recovered—the extra recovery—that they would make a recovery because of the fact [18] that they had additional logs out



(Deposition of Frank Maloney.)

of the woods. The woods were bottlenecked. We knew that, and we know that in many mills' operations they received a lot of value in those logs. Excess logging costs is an operation that any operator will go through in order to get his logs out so that he can run during the wintertime. That matter was discussed very thoroughly.

Q. (By Mr. Barnett): I know that was; but you are now giving me the reasons why you didn't think it ought to be allowed; but the question is, did the appraisers accept the figure that the actual log decking did amount to \$12,492.35, or did they think that the books were incorrect about that?

A. No, I believe that they—I believe that they went into Pickering's books; and there was some discussion on it. I believe that they accepted that figure.

Q. But you did not accept the theory that it ought to be allowed for the reasons that you have mentioned? A. That's right.

Q. You don't remember whether or not they accepted the figure as to the actual amount of excess logging costs? A. Of what?

Q. Of excess logging costs? I am not talking about whether they accepted the idea that it should be allowed, but whether they thought the books properly recorded the amount of excess logging costs.

A. To the best of my knowledge, neither Mr. Lilly nor Mr. Herrick, who were going into Picker-



(Deposition of Frank Maloney.)

ing's books, ever [19] questioned the books at any time, as to their accuracy. This does not mean that I accepted the figure of excess logging cost used by Pickering—I did not.

Q. You didn't go into that feature of it?

A. I couldn't.

Q. What? A. I would get lost.

Q. I say you did not? A. No.

Q. You had to rely upon them for that?

A. I definitely relied on Mr. Herrick and Mr. Lilly.

Q. As to the accuracy of the figures?

A. That's right.

Q. But you did want to be heard as to whether or not—how it should be handled?

A. That's right.

Q. All right. Now, you say that the experts that estimated the amount of log stain, they showed that the big end of the log stain would not have happened within the nine months insured, didn't they?

A. The experts testifying for Pickering did, yes.

Q. They showed the big end of it would have happened within the nine months?

A. That is what the experts for Pickering testified to at the hearing.

Q. Do I understand you were not satisfied with the method by which they estimated it?

A. I was not.

Q. Do you remember what it was that you thought was wrong about it?

(Deposition of Frank Maloney.)

A. I thought it was excessvie.

Q. Yes, I know.

A. My best judgment—I had plenty of counsel—friends in the sawmill business, and people [20] that I have talked with, who have been running planing mills and box factories and have logging operations. I went into this matter on the outside to get information, for I have been in the building business all of my life, and I have been buying lumber, and I have an interest in the largest planing mill in Sacramento; and I know what the boards are in that company; and I know how much damage stain does. I know that right during that time, and almost up to four or five months ago—I am still buying doors with stain in them; and I know that box shook will show stain; one by twelve boards for shelving will show stain with no degrading of it for stain; two by fours, they come through with stain.

Q. Also there was the experts' estimate on rot that would happen?      A. I never——

Q. Was their estimate as to that acceptable to you?      A. It was not acceptable.

Q. Do you know how you arrived at that conclusion?      A. I do.

Q. How did you arrive at it?

A. By consulting men who I considered experts in sawmill operations.

Q. Do you remember who you consulted?

A. I consulted several in Sacramento.

Q. Do you remember——

(Deposition of Frank Maloney.)

A. One of their own witnesses. [21]

Q. That is all right. A. Kirk Setzer.

Q. That is as good a person to consult as anybody else, but—— A. Sure.

Q. Do you know anybody else?

A. Yes, Mr. Thompson, who has the Sacramento mill. He has many mills up in the woods, and so forth. Oh, I talked to lots of people.

Q. Well, I guess it is not material. You didn't make any notes at the time you consulted with them?

A. Certainly, but I didn't keep them.

Q. All right. You don't have them now?

A. No, I wish I did, for I would sure talk so fast I would make you silly.

Q. Maybe you can do that without the notes. Maybe you could make me silly without your notes.

A. Well, that has taught me a lesson, anyway, to never let go of them.

Q. We won't make any point about it, whether you have them or you don't, Mr. Maloney. I am just trying to get you, as near as you can, to tell me exactly what happened.

A. That's all right.

Q. Do you remember how you arrived at the profit of the box factory—as to the cost of the material used in the box factory?

A. Yes. We went to town on that baby for about three days. [22]

Q. All right. Tell us about that.

A. Believe me. Well, it was a question of freight

(Deposition of Frank Maloney.)

differential, and the cost of the stuff, and the allocation of this and that and the other thing; and Mr. Herrick and Mr. Lilly I think outvoted me on that. However, it wasn't such a great deal. And then, of course, they did the bookkeeping. I think that we allowed—I have jotted it down here—\$31.55 was the figure that we used.

Q. Per thousand?           A. Yes.

Q. I think that is right. That is my information.

A. I have that figure jotted down here.

Q. Well, do you know how you arrived at it?

A. Oh, yes, we used the OPA ceiling price, plus the freight differential.

Q. So the OPA ceiling price allowed the freight differential, didn't it?

A. No, we used the OPA ceiling price plus the freight differential.

Q. But the OPA regulations provided for that, didn't they?           A. Oh, sure they did.

Q. So you were actually using OPA ceiling for that?

A. That's right. But we added a very [illegible] freight differential.

Q. What I meant, you weren't departing from the OPA in doing that?

A. No. Except we increased the amount. That

(Deposition of Frank Maloney.)

was the only known price that we had at the time.

Q. You say you had a long argument about that, and they outvoted you on that. What did you want to do, do you remember? [23]

A. I didn't want to give them the freight.

Q. Was that the only difference between you?

A. Yes.

Q. That was the only difference?

A. That's right. I didn't want to allow the freight.

Q. Otherwise you were together on that?

A. That's right. My opinion was that the lumber would have to be put on the green chain; and you had to go in and load it and take it to the job; and somewhere it is going to cost them that even if they took it to the box factory and handled it there; and I didn't think it was necessary to give the freight on it. That is where our only difference of opinion was.

Q. Outside of that, you got along on this?

A. Oh, yes.

Q. All right. Did the appraisers come to the conclusion that Pickering could have reported a loss on its box factory at \$31.55 per thousand?

A. I didn't consider that.

Q. You did not consider that? A. No.

Q. Then why did you use the OPA?

A. Standard price. The known price. It was the price that the law prescribed and Mr. Herrick and Mr. Lilly stated that was the proper accounting practice.

(Deposition of Frank Maloney.)

Q. You say you didn't know any other?

A. What do you mean by that?

Q. I thought you said a while ago—if I misunderstood you, I want you to correct yourself. I am not here to heckle you. [24] I am merely trying to get your story in mind. A. I know that.

Q. I thought you said "We didn't know any other price."

A. Oh, well, that is rather a broad subject. No one up in that neck of the woods could find out what you could purchase lumber for for a box factory. The question was whether you could get it, because, you know, there was a lumber shortage at the time; everybody needed all the logs and all of the lumber that they could get a hold of at that particular time.

Q. Well, the basis wasn't what you could purchase it for? A. No.

Q. It was what had been established by the government?

A. Right. That is what we worked our price from.

Q. Was that the only consideration?

A. That's right as far as the price base was concerned.

Q. There wasn't any other?

A. Not to my knowledge.

Mr. Barnett: I have covered everything I have down here to ask you.

(Unreported discussion.)



(Deposition of Frank Maloney.)

Mr. Barnett: Just one more question:

Q. Do you know how much difference it made using the OPA ceiling price instead of average cost in figuring the profit of the box factory?

A. No, I don't.

Q. Do you have any general recollection? [25]

A. No, I don't; and I had that down, too, because Mr. Lilly and Mr. Herrick worked the thing up there. We had that thing pretty well settled, but I just—when you asked me, I was trying—

Q. To figure how much it might come to?

A. I was just trying to see what that differential would have been; but I really can't say. I am a little dumb on it.

Q. There wasn't any question about the number of feet involved, was there? A. No.

Q. Both accountants had the same number of feet, and you accepted that?

A. To the best of my knowledge, yes.

Q. So that all that it would be would be to take the number of feet, and then the difference between the average cost as set up and the \$31.55 figure, and then figure it out that way?

A. Yes, but we allowed some items of cost that were not claimed by Pickering.

Q. That is all you have to do?

A. That is what we did.

Mr. Barnett: All right. That is all.

By Mr. Levit:

Q. Mr. Maloney, in deciding to use the figure of

(Deposition of Frank Maloney.)

\$31.55, you took into consideration the basis on which the claim was set up for figuring in the proof of claim, did you not?

A. Oh, yes, they dug into that.

Q. And you also took into consideration, did you not, all [26] of the testimony that was produced, the evidence that was produced at the hearing by Pickering and by the insurance companies on the proper way of estimating that cost?

A. We did.

Mr. Levit: That is all.

Mr. Barnett: That is all.

Q. (By Mr. Levit): You stated, Mr. Maloney, that you consulted other people in connection with the appraisal. Was that consultation with these people as experts? In other words, you didn't attempt to get information concerning the Pickering operations from anybody outside, did you?

A. I never mentioned the Pickering operations to anybody that I talked to.

Mr. Barnett: The evidence shows that they accepted the actual figures from Pickering's books. The people that went down from the insurance companies to audit them, didn't question the figures.

Q. (By Mr. Levit): But I understood that you talked to other people. You talked to them as experts merely on the general problems involved, and not on the specific Pickering operations?

A. That's correct.

Mr. Levit: That is all.

United States of America,  
Northern District of California,  
City and County of San Francisco—ss.

I hereby certify that on the 9th day of April, 1948, at 9:00 o'clock a.m., before me, Agnes C. Otto, a Notary Public in and for the City and County of San Francisco, State of California, at the offices of Messrs. Severson, Brown, Keough & McCallum, 605 Market Street, Room 1004, San Francisco, California, personally appeared, pursuant to stipulation between counsel for the respective parties, Frank Maloney, a witness called on behalf of the defendant herein; and Messrs. Long & Levit, represented by Bert W. Levit, Esquire, appeared as attorneys for the plaintiffs; and Messrs. Severson, Brown, Keough & McCallum, represented by Harold Clinton Brown, Esquire, and Messrs. Watson, Ess, Barnett, Whittaker & Marshall, represented by Paul Barnett, Esquire, appeared as attorneys for the defendant; and the said Frank Maloney being by me first duly cautioned and sworn to testify the whole truth, and being carefully examined, deposed and said as appears by his deposition hereto annexed.

And I further certify that the said deposition was then and there recorded stenographically by Harold H. Hart, a competent official and disinterested shorthand reporter, appointed by me for that purpose and acting under my direction and personal supervision, and was transcribed by him.

And I further certify that at the conclusion of the taking of said deposition, and when the testimony

of said witness was [28] fully transcribed, said deposition was submitted to and read by said witness and thereupon signed by him in my presence, and that the deposition is a true record of the testimony given by said witness.

And I further certify that the exhibit hereto attached and marked "Defendant's Exhibit 1 (Maloney)" is the exhibit referred to and used in connection with the deposition of said witness.

And I further certify that the said deposition has been retained by me for the purpose of securely sealing it in an envelope and directing the same to the clerk of the court as required by law.

And I further certify that I am not of counsel or attorney for either or any of the parties, nor am I interested in the event of the cause; I further certify that I am not a relative or employee of or attorney or counsel for either or any of the parties, nor a relative or employee of such attorney or counsel, nor financially interested in the action.

In Testimony Whereof, I have hereunto set my hand and official seal at the City and County of San Francisco, State of California, this . . . . day of . . . . ., A.D. 1948.

.....

Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed D.C. June 9, 1949.

[Endorsed]: Filed C.C.A. March 9, 1950. [29]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK  
TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents, exhibits and depositions, listed below, are the originals filed in this Court, or a true and correct copy of an order entered on the minutes of this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Complaint for Declaratory Relief.

Second Amended Answer and Counter Claim.

Reply to Counterclaim in Second Amended Answer.

Amendment to Reply to Counterclaim in Second Amended Answer.

Defendant's Request for Findings of Fact and Conclusions of Law.

Memorandum Opinion.

Minute Order of December 27, 1949—Order Entering Judgment in Favor of Plaintiffs, Plaintiffs to Have Until January 6, 1950, to Appear and Lodge Findings of Fact and Judgment.

Findings of Fact and Conclusions of Law.

Judgment on Findings.

Notice of Appeal.

Bond on Appeal. [30]

Designation of Contents of Record on Appeal.

Deposition of ANSON HERRICK, Thursday, August 28, 1947, Filed March 17, 1948.



Deposition of LEWIS LILLY, Friday, April 9, 1948, Filed April 20, 1948.

Deposition of FRANK MALONEY, Friday, April 9, 1948, Filed June 9, 1949.

Reporter's Transcripts:

For June 7, 1949, Filed February 23, 1950, Pages 1-43.

Partial Transcript for June 8, 1949, Filed March 6, 1950, Pages 1-24.

Partial Transcript for June 8, 1949, Filed September 7, 1949, Pages 1-74A.

For June 9, 1949, Filed September 7, 1949, Pages 1-123.

For June 10, 1949, Filed September 7, 1949, Pages 124-167.

Partial Transcript for June 10, 1949, Filed February 24, 1950, Pages 168-192.

For June 10, 1949—2 P.M., Filed September 7, 1949, Pages 1-45.

For June 13, 1949, Filed September 7, 1949, Pages 1-78.

Plaintiffs' Exhibits Nos. A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, and W.

Defendant's Exhibit Nos. 1, 2, 3, 4, 5, 7, and 7.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 7th day of March, A.D. 1950.

C. W. CALBREATH,  
Clerk.

[Seal] By /s/ M. E. VAN BUREN,  
Deputy Clerk.



[Endorsed]: No. 12491. United States Court of Appeals for the Ninth Circuit. Pickering Lumber Corporation, a corporation, Appellant, vs. The American Insurance Company, et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 7, 1950.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

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In the United States Court of Appeals  
for the Ninth Circuit  
No. 12491

PICKERING LUMBER CORPORATION, a Corporation,

Appellant,

vs.

THE AMERICAN INSURANCE COMPANY,  
et al.,

Appellees.

APPELLANT'S DESIGNATION OF ALL OF  
THE CERTIFIED RECORD WHICH IS  
MATERIAL TO THE CONSIDERATION  
OF THIS APPEAL

Pickering Lumber Corporation, the appellant in  
the above cause, pursuant to Rule 19, sub-paragraph

6, of the Rules of this Court, hereby designates the following as the portions of the certified record which are material to the consideration of this appeal, to-wit:

The entire certified record, except the final arguments of counsel (which commence with line 22, on page 171, of the official stenographic transcript of the evidence taken in the morning session on Friday, June 10, 1949, and embrace all of the remainder of the original stenographic transcript, to and including line 11, on page 76, of the transcript taken on Monday, June 13, 1949).

/s/ HAROLD C. BROWN,

/s/ HENRY N. ESS,

/s/ CHARLES E. WHITTAKER,

Attorneys for Appellant, Pickering Lumber Corporation.

Received Copy Hereof this 8th day of March, 1950.

LONG & LEVIT,

Attorneys for Appellees.

[Endorsed]: Filed March 8, 1950.